Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

TYRONE BROOKS, et al.,

Petitioners,

vs.

ROY BARNES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in holding that Section 2 of the Voting Rights, 42 U.S.C. § 1973, could not be used to challenge a state's majority vote requirement because of the alleged absence of an adequate remedy?

2. Whether the court of appeals erred in holding that plaintiffs must show that candidates of their choice were usually defeated in all primary elections, rather than the challenged runoff elections?

3. Whether the court of appeals erred in holding that plaintiffs were required to prove that the majority vote law "eviscerated" minority voting rights, particularly where plaintiffs showed the law was enacted with a racially discriminatory purpose?

4. Whether the court of appeals erred in relying primarily upon highly selective, self-serving, after-the-fact testimony, rather than the contemporaneous record, in concluding that race was not a motivating factor in the adoption of the majority vote law?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

Appellants in the court of appeals, and petitioners in this Court, are: Ralph David Abernathy, Rev. G.L. Avery, Ercel Baldwin, Joe Beasley, Mary Black, Tyrone Brooks, Edward Brown, Henry Cook, Deanie Frazier, Edith Ingram Grant, Diane Harvey-Johnson, Bob Holmes, Venus E. Holmes, Rev. Dr. William Howell, Patricia C. Jones, David Lucas, Willie Mays, Billy McKinney, Cynthia McKinney, Frank Redding, Michael Robinson, Annie Smith, Lanette Stanley, John White, Juanita T. Williams, William Young, and, Mary Young-Cummings.

Appellees in the court of appeals were: Zell Miller, Governor of Georgia;[1] the Georgia State Board of Elections; Lewis Massey, Secretary of State and Director of the Georgia State Board of Elections;[2] and, the Constitutional Officers Election Board.

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[1] Miller was succeeded in office as Governor by Roy Barnes.

[2] Massey was succeeded in office as Secretary of State by Cathy Cox.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 158 F.3d 1230 (11th Cir. 1998), and is included in the appendix hereto as App. 1. The December 31, 1998 order of the court of appeals denying the petition for rehearing and suggestion of rehearing *en banc* is unreported and is included at App. 30. The opinion of the district court is unreported and is included at App. 32.

JURISDICTION

The court of appeals entered its opinion on October 30, 1998. Petitioners filed a timely petition for rehearing and suggestion of rehearing *en banc* pursuant to Rule 35, F.R.A.P., and Eleventh Cir. Rule 35-6, which was denied on December 31, 1998. This petition for writ of certiorari is being filed in this Court within 90 days after denial of the petition for rehearing by the court of appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the text of which is included at App. 66.

STATEMENT OF THE CASE

Petitioners are black residents and voters of Georgia. They contend that the statewide majority vote requirement for elections, O.C.G.A. § 21-2-501, was adopted in 1964 purposefully to discriminate against black voters, has the result of diluting black voting strength, discourages black candidates from seeking office, and depresses black political participation in violation of Section 2 of the Voting Rights Act and the First, Fourteenth, and Fifteenth Amendments of the Constitution of the United States. App. 1-2.

The statewide majority vote requirement enacted in 1964 provided in relevant part that:

> No candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office.

O.C.G.A. § 21-2-501; App. 32. In 1994 Georgia repealed the majority vote requirement for all *general* elections, except those for certain constitutional offices, and enacted in its stead a 45% plurality vote rule. O.C.G.A. § 21-2-501(b); App. 2. The 45% rule was adopted in response to the defeat of Wyche Fowler, the incumbent Democrat, by a Republican, Paul Coverdell, in the 1992 general election for U.S. Senate. In a three way contest Fowler won a plurality but lost in the ensuing runoff. Democrats in the legislature enacted the 45% rule to improve the chances of Democrats in future general elections. Trial Transcript ("T"), pp. 371-73, 385; Pl. Exs. 313, p. 147, 322 p. 1180. Because of the partisan motive for

repeal of the majority vote requirement in general elections, and the lack of evidence of its racial impact, plaintiffs have not challenged the 1994 plurality vote law.[3]

Plaintiffs challenge the continued use of the 1964 majority vote requirement for all elections to which it applies, with the exception of county elections involving multi-member bodies (*i.e.*, county governing bodies and school boards). App. 2.[4] The challenged elections include primaries for members of Congress, members of the General Assembly, single member county-level offices, superior court judges and district attorneys, and judges and justices of the Georgia Court of Appeals and Supreme Court. App. 2-3.

Georgia is one of only a handful of states, nine of them in the South, which have adopted statewide majority vote requirements. App. 3 n.1; Pl. Exs. 175, 247-296. In the remaining states, candidates may be nominated and elected by plurality.

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[3] A majority vote for municipal elections is authorized, but not required, by a separate statute enacted in 1968. O.C.G.A. § 21-3-407. A majority vote is also required for election of the governor by a separate provision of the state Constitution. Art. V, § 1, para. II. Neither of these provisions is involved in this litigation.

[4] Since passage of the Voting Rights Act of 1965, virtually all of Georgia's counties with significant minority populations have adopted, either as a result of court orders or voluntarily, remedial districting plans for their multi-member governing bodies which have ameliorated the racial effects of the use of the majority vote requirement in elections for those bodies. Pl. Exs. 303, 303(1)-(62); Association County Commissioners of Georgia, Georgia County Government Yearbook 1995, pp. 29-108.

The trial record in this case contains extensive evidence that Georgia's majority vote requirement was adopted for the discriminatory purpose of diluting and containing black voting strength.

a. The state's electoral traditions were strongly rooted in use of a plurality vote requirement, Pl. Exs. 83, 90, 92, 118, 142, Preliminary Injunction Transcript, July 13, 1990, Vol. 5, p. 88 (hereinafter PIT); the General Assembly changed those traditions only at a time when blacks first began to register and vote in significant numbers.

b. The state has a long history of purposeful discrimination in all areas, including voting. App. 4.

c. The first Election Law Study Committee (ELSC) of the General Assembly was established in 1957 during the time the state's racially discriminatory literacy test[5] and county unit system were still in effect.[6] Given the existence of these barriers to the exercise of the franchise by blacks, the ELSC did not recommend adoption of a majority vote requirement, but left the decision to use

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[5] In South Carolina v. Katzenbach, 383 U.S. 301, 310-11 (1966), the Court described Georgia's voter registration scheme as "specifically designed to prevent Negroes from voting."

[6] The county unit system was a non-majoritarian method of nominating candidates for statewide offices, which allowed the small rural counties with a minority of the population to control the outcome of elections. App. 38; Gray v. Sanders, 372 U.S. 368, 373 (1963). One of the acknowledged purposes of the county unit system was "to destroy black voting strength." Busbee v. Smith, 549 F.Supp. 494, 499 (D.D.C. 1982); App. 4, 38.

plurality or majority vote to the local political party committees, as had been the practice in the past. Pl. Ex. 121.

d. The 1957 ELSC proposed numerous voting practices explicitly designed to exclude blacks from voting, such as a more stringent test for those who sought to register based upon "good character and understanding" as an alternative to literacy. Pl. Exs. 125, 126, 127, 132, 300.

e. The 1957 ELSC also considered party registration as a way of keeping blacks out of Democratic primaries, adding to the list of disfranchising crimes those which blacks were thought most likely to commit, and requiring new voter applicants to appear personally before the local board of registrars. App. 40; Pl. Exs. 125.

f. After the ELSC completed its work in 1958, the legislature enacted the new, more stringent literacy test. App. 38; Pl. Ex. 300, p. 10.

g. The first statewide law that included a majority vote requirement was the 1962 Senate redistricting. A central purpose of the redistricting was to prevent the election of blacks to the Senate from counties, such as Fulton, which had substantial black populations. To fulfill that purpose, the legislature replaced existing single member districts with at-large elections utilizing a majority vote requirement. Governor elect Carl Sanders, who was still president *pro tem* of the Senate, was a leader in Senate redistricting. The district court found that

"Sanders' advocacy of at-large elections was, indeed, racially motivated." App. 44, 64.[7]

h. A comprehensive statewide majority vote bill was first introduced in the General Assembly in 1963 by Rep. Denmark Groover, acknowledged by Sanders and others as an influential and effective legislator. Pl. Ex. 304, p. 54. Groover was an arch segregationist who convinced his colleagues in the House to adopt a majority vote requirement to replace the "protection" that had been lost with invalidation of the county unit system in *Gray v. Sanders*, 372 U.S. 368 (1963), Pl. Ex. 83, to thwart the Negro "bloc vote," and to insure that blacks would not be elected to public office in the state. App. 38. *See* App. 39 ("Groover sold his plan to the House as a means of thwarting election control by blacks, and the bill passed handily"). The court of appeals concluded that "[t]here is no doubt that Groover's majority vote bill was the product of racial animus." App. 5.

i. When the House bill was sent to the Senate in March, 1963, it initially voted a "do not pass" resolution. T, p. 126; Pl. Exs. 85, 300, p. 30. Groover appeared before the Senate Rules Committee, made the same racial arguments he had made in the House, and convinced the committee to withdraw its "do not pass" resolution and assign the majority vote bill to a three member committee for further study. Peter Zack Geer, Lt. Governor and chair

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[7] Sanders, who campaigned for governor in 1962 on a platform of maintaining "Georgia's traditional [racial] separation," labelled himself a "moderate segregationist." Pl. Ex. 300, p. 17.

of the Senate Rules Committee, said that Groover's arguments had convinced him of the need for a majority vote requirement. T, p. 127. Committee members expected that the new 1963 ELSC would consider Groover's proposal in connection with its election code revision work. Pl. Ex. 300, pp. 30-1; T, p. 127.

j. One of the most controversial issues facing the ELSC in 1963 was whether to replace the defunct county unit system with plurality or majority vote. Pl. Exs. 172, 176. The committee, without giving any reasons for its action, proposed in the Fall of 1963 the adoption of a majority vote requirement, despite the stated views of several members that the runoff system was costly, divisive, and lacked sufficient merit to justify the requirement of a majority vote.

J. B. Fuqua, a member of the ELSC and chair of the State Democratic Party, wrote to Secretary of State Ben Fortson, another member of the ELSC, in 1963 that "as a practical matter, the present practice of plurality rather than majority vote has not resulted in widespread inequities or dissatisfaction." Pl. Ex. 300, pp. 34-5; Pl. Ex. 178; T, p. 416. According to Fuqua, because counties financed their own primaries, "changing to the majority vote might make things even worse in some of the smaller counties." App. 43; T, p. 418. William J. Schloth, another member of the ELSC, also favored a plurality vote and for the same reasons as Fuqua. App. 43. He believed the runoff system "is costly and without merit sufficient to justify the requirement of a majority vote." Pl. Ex. 177.

James H. Gray, chair of the State Democratic Committee in 1962, also favored deciding elections on a statewide

plurality basis. According to Gray, "[t]he less discord we have among the contenders in the primary, the better would be our chances of uniting the party. We shouldn't use up all of our steam before the general election." Pl. Ex. 147. Walter Parris, secretary-treasurer of the DeKalb Democratic Executive Committee, favored plurality vote because of the cost of conducting runoff elections. In a letter to the State Executive Committee he said that "we simply can not hold any run off election or primary, as the few candidates can not pay the required amount." Def. Ex. 281.

k. The 1963 ELSC also proposed other discriminatory election procedures, *i.e.*, a revised literacy test for voter registration, an anti-facsimile ballot provision designed to thwart the racial "bloc vote," and a numbered post requirement, the effect of which was to limit single shot voting by minorities. App. 40; Pl. Exs. 209, 216, 300, p. 40.

l. The ELSC considered other measures "aimed at excluding blacks from voter rolls," including making it a felony to assist anyone in casting a vote. App. 40.

m. The Democratic Party, which adopted a majority vote rule for statewide primary elections in 1962, extended the majority vote requirement to county primary elections in 1964. Pl. Exs. 148, 300, p. 41. Despite opposition to majority vote based on the expense of having to conduct runoffs and the discord caused by runoffs, the party justified the majority vote rule on the ground that "everything is leaning" toward a majority vote since the county unit system was thrown out. *Id.*

n. The district court found that "Georgia's efforts at election law reform from 1957 to 1964 grew in large part from a desire to maintain a segregated and discriminatory status quo in the face of rising black voter registration and heightened scrutiny by the federal government." App. 63.

o. The statewide majority vote law was adopted by the General Assembly in 1964. Members of the legislature understood that it would make it more difficult for blacks to get elected in racially polarized majority white jurisdictions. George T. Smith, Speaker of the House, testified that "I'm sure everybody [in the General Assembly] thought that or realized that." PIT, Vol. 5, pp. 35, 93.

p. While there was self-serving, anecdotal, after-the-fact testimony *at trial* some 30 years later about so-called "stalking horse" candidates and "courthouse crowds," there was no evidence in the contemporaneous record that these matters were discussed by members of the legislature, Governor Sanders or his administration, or that the use of plurality vote had resulted in widespread inequities or dissatisfaction. There were, however, as noted *supra*, substantial good government reasons for retaining use of a plurality vote rule that were discussed in the contemporaneous record.

q. In addition to the majority vote provision, the General Assembly also adopted in 1964 a discriminatory literacy requirement for voter registration and a discriminatory "good character and understanding" test as an alternative to literacy. Ga. Laws 1964, Ex. Sess., pp. 57-60.

r. The General Assembly delayed implementation of the majority vote requirement for counties until 1965, but at the same time refused to delay its implementation in a 1964 Fulton County (Atlanta) judicial election in which there were two white and one black candidates and in which the majority vote requirement would have an obvious racial impact. The district court found that "anti-black sentiment may have played a role in the Senate's refusal to delay [implementation of the majority vote requirement in Fulton County]." App. 43.

The majority vote requirement has also had the discriminatory effect its proponents foresaw and intended. As the court of appeals found, a net of 27 plurality winning blacks have been denied nomination or election to office by operation of the majority vote requirement. App. 8.[8]

The majority vote requirement has had the greatest impact in majority white jurisdictions, which include the state as a whole and majority white congressional, legislative, and county level districts. T, p. 361. Of the 60 black/white runoff sequences from 1964-1996 in majority

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[8] From 1970-1995 there were 278 black-white runoff sequences, *i.e.*, sequences in which black and white candidates were in both the primary or general election and the runoff. Of these 278, the majority vote requirement changed the result in 85 (31%). Of the 85, 56 (66%) were sequences in which blacks won the initial election but lost the runoff (W-L), and 29 (34%) were sequences in which blacks came in second in the initial election but won the runoff (L-W). The net loss to blacks caused by the majority vote requirement was thus 27 nominations or elections to office. App. 8.

white jurisdictions in which the majority vote requirement affected the outcome, blacks lost 45 (75%) of the runoffs. T, p. 287; Pl. Ex. 301, Table A.

Petitioners also conducted a racial bloc voting analysis of the 27 black-white runoff contests from 1992 to 1996 for which data was available, whether Democratic primary, Republican primary, general or special election. T, pp. 270, 482. Based upon regression analysis, the average level of white bloc voting was 83%. The average level of black cohesion was 85%. Pl. Exs. 301, 301-B, p. 4. Voting was racially polarized in 25 (93%) of the 27 individual contests. *Id.* The homogeneous precinct analysis confirmed the regression estimates. On average, and at a minimum, the black cohesion rate in the homogeneous precincts was 82%, and the level of white bloc voting was 76%. T, p. 272; Pl. Ex. 301-C, pp. 1-6.

There was substantial testimony from experienced black political leaders that the majority vote requirement discouraged blacks from running for office, particularly statewide office and in majority white jurisdictions. Andrew Young, former mayor of Atlanta, testified that blacks had been discouraged from running for Congress because they "felt like you couldn't get a majority of the vote in a runoff." Pl. Ex. 114, p. 39. Maynard Jackson, another former mayor of Atlanta and a member of the executive committees of the state and national Democratic parties, said that the majority vote requirement "discouraged me and many others from seeking public office." T, p. 56. Other witnesses testified to the same effect, *e.g.*, plaintiff Brooks, PIT, Vol. 3, p. 26 ("[t]he runoff system has been very discouraging in terms of black people running for various positions in our state, very

discouraging"); Orion Douglas, an African-American judge from Glynn County, Pl. Ex. 318, p. 5 (the majority vote requirement "can have a deterrent effect on minority candidates"); plaintiff Avery, P. Ex. 114, p. 24 ("I knew if I made it through the primary, I felt I would lose in the runoff"). There was no testimony or evidence that the majority vote requirement deterred whites from running for office.

A. The Opinion of the Court of Appeals.

The court of appeals found no violation of the "results" standard of Section 2 because "Plaintiffs failed to establish an adequate remedy," App. 21, the runoff system as a whole "does not 'eviscerate[ ] the ability of minority voters to elect their candidates of choice,' " App. 25, and "there was no proof that the law would act as a greater deterrent for black candidates than for white candidates." App. 8. The court rejected plaintiffs' claim of purposeful discrimination under Section 2 and the Constitution on the grounds that "discrimination was not a substantial or motivating factor behind enactment of the majority vote provision." App. 26.

REASONS FOR GRANTING THE WRIT

This case presents substantial questions involving the application of Section 2 of the Voting Rights Act to majority vote requirements, the extent to which federal courts may override the intent of Congress in the area of voting, and whether the courts may impose burdens of proof

upon minority plaintiffs that are more onerous than those imposed upon white plaintiffs challenging state voting practices as being discriminatory.

I. The Court of Appeals' Analysis Violates the Voting Rights Act and Is Contrary to the Intent of Congress

A. The First Prong of *Gingles*; An Adequate Remedy Exists.

The court of appeals concluded that there could be no Section 2 violation in this case in light of the first prong of *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), because "Plaintiffs failed to establish an adequate remedy." App. 21. According to the court, a plurality system could result "in a candidate's winning with 1% of the vote" which "would seriously undermine the legitimacy of the government." *Id.* The analysis of the court of appeals has no basis in experience, logic, or law.

First, the majority of elections in the United States are conducted under a plurality system, and without undermining the legitimacy of the government. *See Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364, 1371 (1997) (describing as one of the "features of our political system . . . 'first past the post' elections"). Second, the notion that a candidate could get elected with 1% of the vote is fanciful. There would have to be an absolute *minimum* of 101 candidates in a contest for any person to win with just 1% of the vote! Such a field of candidates doesn't describe elections in Georgia or any other state.

Third, in the event of a Section 2 violation, the state would be given the first opportunity to fashion a remedy. *Voinovich v. Quilter*, 507 U.S. 146, 156 (1992). The purpose

of the first *Gingles* prong is merely to determine whether any remedy is possible in the first instance. While a pure plurality system, which was the method commonly used in the state prior to 1964, could be one such remedy,[9] the state would be free to adopt a substantial plurality rule, provided it "completely" and "fully" remedied the violation. S.Rep. No. 417, 97th Cong., 2d Sess. 31 (1982). The state has in fact adopted such rules for general elections demonstrating beyond cavil that an alternative to the existing majority vote rule exists which does not "undermine the legitimacy of the government."

Unfortunately, the decision of the court of appeals represents yet another example of how the Voting Rights Act is being repealed incrementally by the lower federal courts. The Eleventh Circuit has previously held that Section 2 does not apply to the method of electing judges because there can be no remedy for the Section 2 violation. *See Davis v. Chiles*, 139 F.3d 1414, 1423 n.19 (11th Cir. 1998) ("we would be compelled to rule against all plaintiffs who bring Section 2 cases involving judicial elections"), *cert. den'd*, 67 U.S.L.W. 3554 (1999). The Sixth

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[9] In both City of Rome v. United States, 446 U.S. 156, 183 (1980), and City of Port Arthur v. United States, 459 U.S. 159, 167 (1982), for example, the alternative to majority vote requirements objected to under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, was simply the preexisting system of election by a plurality of the votes. *See also* Note, Application of Section 2 of the Voting Rights Act to Runoff Primary Election Laws, 91 Colum.L.Rev. 1127, 1148 (1991) ("[t]he obvious alternative [to a majority vote requirement] is a plurality vote system").

Circuit reached a similar conclusion in *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998), *cert. den'd*, 67 U.S.L.W. 3524 (1999). The present decision now adds majority vote requirements to the list of practices excluded from the scope of the Act.

Congress plainly intended for Section 2 to reach majority vote provisions. The Senate report not only identifies "majority vote requirements" as a factor probative of minority vote dilution, S.Rep. No. 417 at 29, but lists "at-large elections, majority vote requirements and districting plans" as among the practices directly subject to challenge under the statute. S.Rep. No. 417 at 30. In *Thornburg v. Gingles*, 478 U.S. at 43 n.7, 56, the Court acknowledged the Senate report as being "the authoritative source" for construction of the Act, and similarly noted the "potentially dilutive" effect of majority vote requirements. *Accord*, *White v. Regester*, 412 U.S. 755, 767 (1973) (a majority vote requirement "enhanced the opportunity for racial discrimination").

In implementing Section 5 of the Act, 42 U.S.C. § 1973c, this Court has denied preclearance to majority vote requirements because of their potential for diluting minority voting strength. In *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1982), for example, the Court conditioned preclearance of a new election plan on abolition of the majority vote requirement for at-large nonmayoral candidates for the reason that "[i]n the context of racial bloc voting . . . the rule would permanently foreclose a black candidate from being elected to an at-large seat." And in *City of Rome v. United States*, 446 U.S. 156,

184 (1980), the Court denied preclearance to a city's adoption of a majority vote requirement because it "significantly decreased" the electoral opportunities of black candidates. The Attorney General, whose administration of the Act is entitled to "substantial deference," *Lopez v. Monterey County*, 119 S.Ct. 693, 702 (1999), has also routinely objected to majority vote requirements under Section 5. U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 69 (1981).

Judicial deference to an act of Congress is particularly appropriate in an area, such as voting, where Congress has "a specially informed legislative competence." *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966). Under the circumstances, it is not the court of appeals' prerogative to substitute its judgment for that of Congress and conclude that a voting practice would "undermine the legitimacy of the government." Instead, the court's role is to determine if there is "a basis upon which Congress might predicate a judgment" that a given practice is subject to challenge under the Constitution or the Voting Rights Act. *Id.* There clearly was a basis upon which Congress could conclude that abolition of discriminatory majority vote requirements was a valid means of implementing the Fourteenth and Fifteenth Amendments.

The decision of the court of appeals that majority vote requirements cannot be challenged under Section 2 is such a radical departure from the intent of Congress, and this Court's construction and implementation of the Voting Rights Act, as to warrant the granting of certiorari.

B. The Third Prong of *Gingles*; "Evisceration" Is Not the Standard.

The court of appeals held that plaintiffs failed to establish the third prong of *Gingles*, 478 U.S. at 51, because runoffs occur "in only a small fraction of all primaries," and "[t]hus, even if there were a significant racial impact in the context of all runoffs, it could not be said that the white majority usually defeats the minority's preferred candidate under Georgia's primary runoff system." App. 23. According to the court, the system as a whole "does not 'eviscerate[ ] the ability of minority voters to elect their candidates of choice.' " App. 25.

The court of appeals' opinion loses sight of the nature of the complaint, which is that *runoffs* discriminate against minorities. *See Gingles*, 478 U.S. at 47 ("[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure" dilutes minority voting strength). The runoff requirement does in fact dilute minority voting strength. Aside from its discouragement of black candidates, a net of 27 plurality winning blacks have been denied nomination or election to office by operation of the majority vote requirement. App. 8. The fact that elections in which there is no runoff may not discriminate against minorities is beside the point.[10]

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[10] The court of appeals credited the "theory" of defendants' expert (Magiotto) that blacks who lost in runoffs were just "weak" candidates. App. 9. He admitted, however, that under his definition "strong" candidates, *i.e.*, those who got more than 40% in the initial primary, lost at least a third of the time. T, p. 529. He also admitted that he did not consider either the levels of racial bloc voting or the racial composition of the electorate,

The court of appeals' analysis is contrary to *Shaw v. Hunt*, 116 S.Ct. 1894 (1996). In *Hunt* this Court held that vote dilution is not remedied in one area of a state merely because minority voters in another area have access to the political process. *Id.* at 1906. By the same token, the discriminatory effect of runoffs is not remedied simply because there may be no discriminatory effect in elections in which there are no runoffs. In addition, where, as here, there is evidence of purposeful discrimination, the quantum of discriminatory effect required for proof of a violation of Section 2, or the Constitution, is at most minimal. In *Hunter v. Underwood*, 471 U.S. 222, 232 (1985), a Fourteenth Amendment case, the Court invalidated an Alabama statute disfranchising persons convicted of certain crimes because the law had been enacted in 1901 to discriminate against blacks and it had a "racially discriminatory impact." The impact was simply that in Jefferson and Montgomery Counties, in which the two plaintiffs resided, blacks were 1.7 times as likely as whites to be disfranchised under the statute. 471 U.S. at 227. There was no evidence of the impact of the statute in other counties or statewide.

In *Rogers v. Lodge*, 458 U.S. 613, 617 n. 5 (1982), a voting case decided prior to adoption of the "results" standard of Section 2, the Court held that "[p]urposeful racial discrimination invokes the strictest scrutiny of

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and that in a racially polarized, majority white jurisdiction, a black candidate who got 100% of the black vote could, under his theory, be a "weak" candidate. T, pp. 531, 534. Any theory of vote dilution which treats black candidates who get substantial support from black voters as "weak" is not only useless but highly misleading.

adverse differential treatment." Given the evidence of purposeful discrimination in this case, the "evisceration" test applied by the court of appeals does not begin to approach the standard of review set forth by *Rogers v. Lodge*. Moreover, in *City of Richmond v. United States*, 422 U.S. 358, 378-89 (1975), the Court held that no proof of discriminatory effect was required for a violation of Section 5 of the Act where there was evidence of discriminatory purpose. Instead, a voting practice adopted with a discriminatory purpose "is forbidden by § 5, whatever its actual effect may have been or may be." *Accord, City of Pleasant Grove v. United States*, 479 U.S. 462, 471 n.11 (1987). A similar rule should apply to cases brought under Section 2. Even assuming the constitutional analysis of *Hunter v. Underwood*, and not the statutory analysis of *City of Richmond v. United States*, is applicable to plaintiffs' Section 2 claim, there was clear evidence of adverse effect flowing from use of the majority vote requirement.[11]

The court of appeals applied the wrong legal standard in concluding that plaintiffs' burden was to show that the majority vote law had "eviscerated" minority voting strength – including in elections in which there was no runoff. The court trivialized the importance of racial discrimination in violation of the repeated admonitions of this Court. *See Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (racial classifications "are by their very

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[11] As noted *infra*, in cases subsequent to Hunter v. Underwood, the Court has dispensed with any requirement of proof of actual harm or vote dilution in constitutional challenges brought by white voters to majority black districts.

nature odious to a free people whose institutions are founded upon the doctrine of equality"); *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility").

C. The Evidence of Discouragement Was Unrebutted.

Plaintiffs' evidence that the majority vote requirement discouraged blacks from running for office was substantial and unrebutted. By contrast, there was no evidence that whites were similarly discouraged from running for office. Plaintiffs carried their burden of proof on this issue. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (in civil cases "plaintiff's burden of proof is a mere preponderance of the evidence"). The court of appeals erred as a matter of law in concluding that "there was no proof that the law would act as a greater deterrent for black candidates than for white candidates." App. 8.[12]

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[12] The court of appeals also erred in holding that "the evidence did not enable the court to ascertain how pervasive any deterrent effect had been." App. 7. Plaintiffs were not required to quantify the deterrent effect of the majority vote requirement through, for example, a survey or statistical analysis. The courts have consistently held that plaintiffs may prove the elements of a Section 2 violation through competent lay testimony, as was done in this case. *See, e.g.*, Windy Boy v. County of Big Horn, 647 F.Supp. 1002, 1013 (D.Mont. 1986) (relying upon lay testimony as "evidence of race conscious politics"); Jackson v. Edgefield County, South Carolina, 650 F.Supp. 1176, 1198 (D.S.C. 1986) (finding the testimony of experienced local politicians "[e]ven more persuasive . . . than the experts' quantitative analysis").

II. The Court of Appeals' Purpose Analysis Was Inherently Unreliable and Failed to Follow Arlington Heights

In disposing of plaintiffs' statutory and constitutional claims, the court of appeals concluded that "discrimination was not a substantial or motivating factor behind enactment of the majority vote provision." App. 26. In reaching this conclusion the court failed to apply the "circumstantial and direct evidence" analysis of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266 (1977). It discounted, for example, the "contemporaneous statements by members of the decisionmaking body," *id.* at 268, *i.e.*, Groover's open racial appeals to both the House and Senate. It found essentially irrelevant the "series of official actions taken for invidious purposes" and "the specific sequence of events leading up to the challenged decision," *id.* at 267, *e.g.*, the discriminatory Senate redistricting plan and the literacy and good character tests passed by the legislature, as well as the myriad discriminatory proposals considered or proposed by the ELSC, such as party registration, the anti-facsimile ballot provision, adding to the list of disfranchising crimes those which blacks were thought most likely to commit, and making it a felony to assist anyone in casting a vote. It brushed aside "[d]epartures from the normal procedural sequence," *id.*, *i.e.*, the legislature's insistence on immediate implementation of the majority vote requirement only in Fulton County where a judicial contest was taking place involving a black candidate.

Far from following the analysis required by *Arlington Heights*, the court of appeals improperly gave controlling

weight to inherently self-serving testimony given more than 30 years after-the-fact by certain members of the legislature, while ignoring entirely contradictory testimony by other members of the same body. The court merely repeated its errors in further concluding that the majority vote law "would have been passed in the absence of any discriminatory motive." App. 26.

Arlington Heights, 429 U.S. at 266-687, held that the most probative evidence of legislative purpose comes from the contemporaneous record. *Accord, Hunter v. Underwood*, 471 U.S. at 228-33. After-the-fact reconstructions of motive are entitled to little weight because they are inherently self-serving and unreliable. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 117-18 (1980) ("*post hoc*" statements are "not . . . entitled to much weight"); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (after-the-fact statements are a " '*post hoc* rationalization' and thus must be viewed critically").

There is nothing in the contemporaneous record of passage of the majority vote law indicating widespread abuse of plurality voting or that so called "stalking horses" or "courthouse crowds" played a role in the decisionmaking process of the General Assembly. If members of the legislature and the ELSC were preoccupied with such things, they would surely have said something about them. What they did talk about was thwarting the Negro "bloc vote" through adoption of a majority vote requirement, keeping blacks out of the Senate and the

judiciary by every means possible, and shoring up the state's discriminatory registration procedures.[13]

The court of appeals placed special reliance on the testimony of Melba Williams, a member of the ELSC, George T. Smith, the former Speaker of the House, and Eugene Patterson, a journalist, for the proposition that the majority vote law was not motivated by an intent to discriminate. App. 12. Williams, however, was not appointed to the ELSC until *after* the decision to propose adoption of a majority vote requirement had already been made. PIT, Vol. 5, pp. 127, 135. She admitted that "[a]fter I got on the committee, there was never any discussion [about] . . . the majority vote." PIT, Vol. 5, p. 135.

George T. Smith could not remember any discussions he may have had about the majority vote requirement, nor did he know the reasons other members of the General Assembly supported the majority vote bill. Pl. Ex. 305, pp. 15-6. As for Eugene Patterson, far from denying the existence of a racial motive, he was

> sure that's why the legislature passed the [majority vote] law. As I said in the beginning, racial motivations were everything in the politics of that period. And so the county segregationists probably saw this as some means to diminish the influence of blacks.

Joint Ex. 1, p. 25; T, pp. 247, 464.

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[13] Upon a record far less compelling than that here, the three-judge court in Jeffers v. Clinton, 740 F.Supp. 585, 595 (E.D.Ark. 1990), found "[t]he inference of racial motivation is inescapable," and held that the adoption of a majority vote requirement for general elections for municipal offices was unconstitutional.

The court of appeals also ignored entirely the testimony of members of the legislature who said that the majority vote law *was* enacted with a racially discriminatory purpose. Sen. Leroy Johnson testified that:

> There is no question in my mind that Denmark Groover's 1963 bill was a direct precedent for the statewide majority vote requirement adopted as part of the election code in 1964.

Pl. Exs. 306, p. 6, 307, pp. 649, 668-69. Johnson stressed that:

> many white members of the General Assembly favored adoption of a statewide majority vote requirement as a method of diluting minority voting strength. . . . The General Assembly would not have passed a statewide majority vote requirement, either as a house bill in 1963 or as part of the 1964 election code, unless the more conservative members were convinced that the runoff system would help maintain white control over local and state government.

Pl. Exs. 306, pp. 7-8.

James Mackay, a member of the House and later a member of the U.S. Congress, agreed that the majority vote provision was passed with a discriminatory purpose and would not have been enacted "had these members not been convinced of the racially discriminatory potential of the runoff system." Pl. Ex. 308, pp. 3-4.

Similarly, the court of appeals ignored the testimony of two historians that the majority vote requirement was enacted with a discriminatory purpose. Dr. Morgan Kousser, professor of history at the California Institute of Technology, said in his report that:

> Every factor that should be considered in a voting rights intent case points, in this instance, to the same conclusion, and every factor counts heavily against the alternative hypotheses.

Pl. Ex. 102, p. 27. He concluded that "the majority vote requirement was adopted with a racially discriminatory intent." *Id.* at 32. Dr. Steven Lawson, professor of history at the University of North Carolina-Greensboro, based on his independent research, reached the same conclusion:

> Having reviewed the succession of historical events starting in 1957 that culminated in enactment of the majority vote requirement for all elections in 1964, it is the author's professional opinion that race played an integral part in determining the legislative outcome.

Pl. Ex. 300, p. 60.

Stalking horses and courthouse crowds are in reality red herrings. The court of appeals failed to follow the analysis in *Arlington Heights* and instead improperly gave controlling weight to highly selective, self-serving, after-the-fact testimony. As a district court said in another voting case, to ignore the evidence of racial purpose here would "prove that justice is both blind and deaf." *Sims v. Baggett*, 247 F.Supp. 96, 109 (M.D.Ala. 1965).

III. The Court of Appeals Applied a Double Racial Standard

The treatment of the claims of the black plaintiffs in this case and those of the white plaintiffs in recent redistricting cases, such as *Shaw v. Reno*, is starkly different. The plaintiffs in *Shaw v. Reno* did not allege, and were not

required to prove, any personal injury or denial of their voting rights, 509 U.S. at 641 (plaintiffs "did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength"),[14] nor that the legislature intended to discriminate against them or white voters. 509 U.S. at 642 (where a district has a "bizarre" shape "[n]o inquiry into legislative purpose is necessary"). Indeed, the admitted purpose for adoption of the challenged plan in *Shaw v. Reno* was to comply with the Voting Rights Act. 509 U.S. at 655 ("appellees contend that the General Assembly's revised plan was necessary . . . to avoid dilution of black voting strength in violation of § 2").[15]

Plaintiffs here, by contrast, were required to show the "evisceration" of their voting rights, and to prove discrimination against blacks by "smoking gun" evidence, App. 13, 25. Dual standards of this sort are incompatible

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[14] *See also* Bush v. Vera, 116 S.Ct. 1941, 1977 (1996) (the "discrimination" in these cases exists "only in the sense that the lines are drawn based on race, not in the sense that harm is imposed on a given person on account of their race") (Stevens, J., dissenting); Abrams v. Johnson, 117 S.Ct. 1925, 1949 (1997) ("[t]his is not a suit in which there are claims of interference with the right to cast a ballot or 'dilution' of the majority's vote") (Breyer, J., dissenting).

[15] Similarly, in the other *Shaw* type cases the motive of the legislature was not to discriminate against the plaintiffs or white voters but to comply with the Voting Rights Act and/or Section 5 objections by the Attorney General. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 918 (1995) (the General Assembly "was driven by its overriding desire to comply with" a Section 5 objection); Shaw v. Hunt, 116 S.Ct. at 1901 (the state's "*overriding* purpose was to comply with the dictates of the Attorney General's" Section 5 objection letter).

with any principled understanding of the Fourteenth Amendment and the Voting Rights Act. For this reason alone, plenary review is appropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-9284

D.C. Docket No. 1:90-CV-1001-RCF

TYRONE BROOKS, LANETT STANLEY, et al.,

Plaintifffs-Appellants,

versus

ZELL MILLER, Governor of Georgia, GEORGIA STATE BOARD OF ELECTIONS, et al.,

Defendants-Appellees.

Appeal From the United States District Court
for the Northern District of Georgia

(October 30, 1998)

Before DUBINA and MARCUS, Circuit Judges, and PROPST*, Senior District Judge.

DUBINA, Circuit Judge:

In this voting rights action, Plaintiffs, 27 black Georgia residents and voters, challenge the majority vote requirement for primary elections in Georgia, set forth in O.C.G.A. § 21-2-501. The complaint was certified as a class action on behalf of all present and future black

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* Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation:

registered voters in Georgia. Plaintiffs contend that the majority vote requirement, also known as the primary runoff requirement, violates § 2 of the Voting Rights Act, 42 U.S.C. § 1973, as well as the First, Fourteenth, and Fifteenth Amendments to the United States Constitution. After a bench trial, the district court ruled that Georgia's majority vote provision for primary elections is constitutional and does not violate § 2.

I. FACTS

O.C.G.A. § 21-2-501 originally required that a candidate in a primary or general election receive a majority of the votes cast in order to be nominated or elected and provided for a runoff election in the event that no candidate received a majority. In 1994, after the filing of this action, Georgia's General Assembly repealed the majority vote requirement for all general elections, except those for certain constitutional offices not at issue here, and replaced it with a 45 percent plurality rule. *See* O.C.G.A. § 21-2-501(b), as amended by Ga. L. 1994, p. 279, § 11; O.C.G.A. § 21-2-2(18.1) (defining plurality as 45 percent of the total votes). In this action, Plaintiffs do not challenge the 45 percent plurality rule for general elections or majority voting as it affects multi-member offices such as school boards and county commissions. What Plaintiffs do challenge is the majority vote requirement for primary elections for single member, county-level offices, members of the General Assembly, superior court judges and

district attorneys, and judges and justices of the Georgia Court of Appeals and Georgia Supreme Court.[1]

In 1990, after conducting a five-day hearing on Plaintiffs' motion for preliminary injunctive relief, the district court denied the Plaintiffs' motion. Shortly thereafter, the United States Department of Justice filed a parallel case which was consolidated with this action. Before trial, the United States filed a motion to voluntarily dismiss its complaint which the district court granted.

The district court made extensive findings of fact in this case. The district court relied on testimony presented at the four-day bench trial in 1996 and testimony presented at the hearing held in 1990 on Plaintiffs' motion for preliminary injunctive relief, along with other exhibits and reports submitted by the parties. In order to resolve the Plaintiffs' claims, the district court focused its findings of fact on two key areas. First, the district court examined evidence relating to the process by which the majority vote provision was enacted into law to determine whether it was passed for a racially discriminatory purpose. Second, the district court considered evidence presented on the issue of whether the majority vote law has a discriminatory impact. The following is a summary of the district court's factual findings.

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[1] Georgia is one of nine states with a majority vote requirement for primary elections. *See* Ala. Code § 17-16-36 (1995); Ark. Code Ann. § 7-7-102 (Michie 1993); Fla. Stat. Ann. § 100.061 (West 1982); O.C.G.A. § 21-2-501 (1993 & Supp. 1997); La.Rev.Stat. Ann. § 18:511 (West 1979 & Supp. 1998); Miss.Code Ann. 23-15-191 (1990); Okla. Stat. Ann. tit. 26, § 1-103 (West 1991); S.C. Code Ann. § 7-17-600 (Law. Co-op. 1977); Tex. Elec. Code Ann. § 172.003 (West 1986).

A. *Discriminatory Purpose*

The district court acknowledged Georgia's long history of racial discrimination at all levels of government. The voting strength of blacks has historically been diminished in Georgia in numerous ways, including property ownership requirements, literacy tests, and the use of the county unit system which undermined the voting power of counties with large black populations. The county unit system gave each county twice as many unit votes for the purpose of nominating candidates for statewide office as the county had representatives in the Georgia House. This system had the effect of increasing the voting power of rural counties and diluting that of urban areas. In 1962, a three-judge federal panel struck down Georgia's county unit system as unconstitutional. *See Sanders v. Gray,* 203 F.Supp. 158 (N.D. Ga. 1962).

The majority vote provision at issue in this case was enacted as part of a sweeping election reform bill signed into law in 1964 by then-Governor Carl E. Sanders ("Governor Sanders" or "Sanders"). This law was Georgia's first election code. Prior to 1964, Georgia's election system was chaotic. The rules for primary and general elections varied from county to county and election to election. Corruption and manipulation were commonplace. Throughout the state, and particularly in rural counties, groups known as "courthouse crowds" controlled local elections and often manipulated election practices to maintain their own power. Georgia was essentially a one-party state, and a victory in a Democratic primary was tantamount to election.

One form of election manipulation used under the plurality system consisted of entering a "stalking horse" into a local race to split the opposition vote and assure victory to courthouse crowd candidates. Governor Sanders experienced this tactic first hand when he ran against Peter Zack Geer in the 1962 lieutenant governor's race. Sanders withdrew from the race after hearing that Geer planned to enter a candidate named Carl F. Sanders in the race to confuse voters and ensure his own victory. Sanders ran for governor instead and won.

When the Georgia legislature created the first Election Laws Study Committee ("ELSC") in 1957 to examine election practices and propose legislation, members of this committee were interested in maintaining the discriminatory status quo through measures such as literacy tests. The first ELSC did not produce any comprehensive election reform. A second ELSC was formed in 1961 but dissolved without taking any action.

In 1963, after the county unit system had been struck down as unconstitutional, Denmark Groover ("Groover"), a state representative known for his staunch segregationist views, attempted to pass a majority vote requirement. There is no doubt that Groover's majority vote bill was the product of racial animus. He opposed "bloc voting," a euphemism for black citizens voting in a bloc. Groover's bill passed in the House but died in committee in the Georgia Senate.

Governor Sanders called for the creation of a third ELSC in 1963 for the purpose of drafting an election code.

There were more racially moderate members on this committee than on the previous ELSCs. The third ELSC recommended a majority vote requirement, in addition to numerous other measures, as part of a comprehensive election code. The General Assembly adopted most of these recommendations, including the majority vote requirement. The ELSC's recommendations included some discriminatory measures such as a scaled-down version of a literacy test. However, some of the proposals of the third ELSC were either not related to race or promoted increased black participation in elections. For example, the 1964 code required that a voting registrar be present at the county courthouse during all business hours and that voter registration remain open until 50 days before an election.

Many supporters of the 1964 election code's majority vote requirement had legitimate "good government" motives. These backers wanted to reduce the power of the courthouse crowds and to eliminate the use of stalking horses and dummy candidates as a method of election manipulation. Governor Sanders was one of the key supporters of the measure. In the context of Georgia politics in the early 1960's, Sanders was regarded as a moderate on racial issues. He opposed the civil rights movement, yet he was not a militant segregationist. Sanders had considerable power over the General Assembly, enabling him to influence the agenda of the legislature. His power in the legislature was so great that he was able to install his friend and supporter, George T. Smith ("Smith"), as Speaker of the House.

Plaintiffs emphasize the racial antipathy of Groover and attempt to impute the improper motivations behind

his proposal of the majority vote in 1963 to the supporters of the 1964 code's majority vote requirement. The district court found that Groover's racist motives were not attributable to the supporters of the 1964 law. Groover supported Sanders' opponent in the governor's race and was not involved in the Sanders administration. He was not a member of the third ELSC, and he had no influence over that committee.

The district court also acknowledged that Sanders favored at-large elections in 1962, when he was president *pro tem* of the Senate, for racially discriminatory reasons as well as some sound government reasons. Again, the district court chose not to impute those discriminatory motives to Sanders's support of the majority vote law in 1964 in the absence of evidence indicating that the 1964 majority vote provision itself was racially motivated.

B. *Discriminatory Impact*

On the question of the effect of the majority vote law, the district court considered testimony as to the law's impact on individuals considering a run for office as well as statistical analyses of data showing how the law affected actual elections. The district court found that though there was some evidence minimally supporting the theory that black candidates were discouraged from running for office by the prospect of a runoff, the evidence did not enable the court to ascertain how pervasive any deterrent effect had been. In other words, the Plaintiffs failed to prove that the majority vote law improperly discourages potential black candidates. In addition, there

was no proof that the law would act as a greater deterrent for black candidates than for white candidates.

Defendants' expert witness supervised the compilation of a database containing information on the effect of the majority vote requirement on Georgia primary elections from 1970 to 1995. During this period, there were a total of 2,798 runoff sequences, and complete data was available for 2,773 of these. Over 90 percent of these runoffs were in Democratic party primaries. Of these 2,773 runoff sequences, there were 278 which involved a black candidate and a white candidate in both the primary election and the runoff. In 85 of the runoffs between a black candidate and a white candidate, the candidate who won a plurality of votes in the initial primary election lost in the runoff. The district court described these 85 runoff elections as "flip" sequences.

In 56 of the flip sequences, the black candidate lost the runoff after receiving a plurality of the votes in the initial primary. In 29 of the flip elections, the white candidate lost the runoff after receiving a plurality of the votes in the initial primary. Thus, the majority vote requirement for primary elections yielded a net result of 27 fewer black candidates than would have been nominated under a pure plurality scheme.[2]

Most of the 27 flip elections adverse to black candidates occurred at the county and local levels. A net loss of 30 black candidates in local and county elections resulted

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[2] Significantly, it does not follow that Georgia would have had 27 additional black office holders because a victory in a primary election does not ensure a win in the general election.

from the majority vote requirement. In state legislature and superior court elections, the primary runoff requirement resulted in a net gain of three black candidates. In state-wide and federal primaries, the net results would have been the same under a plurality scheme as they were under the majority vote requirement.

The district court found that the disparity in outcomes in primary runoff elections was attributable to the relative strength of individual candidates and not to any alleged discriminatory impact of the majority vote requirement. The Defendants' political science expert presented a theory under which a candidate who receives 40 percent or more of the votes in the initial election and who leads his or her opponent by at least five percent is considered a "strong leader." In other words, a "strong leader" is a candidate who soundly wins an election. Runoff winners were overwhelmingly "strong leaders" in their initial primary races. The runoff winners averaged above 40 percent of the initial vote and generally led their nearest opponent by 10 to 12 percentage points. Black "strong leaders" defeated white opponents in runoffs 71 percent of the time. The black candidates who lost in runoffs typically entered the runoff elections in a much weaker position. The district court concluded that black leaders who lost runoffs were on average weaker candidates than black or white leaders who won runoff elections. On the question of racial polarization, the district court found that the Plaintiffs failed to prove that voting in Georgia was racially polarized.

The district court concluded that, overall, Plaintiffs failed to demonstrate that the majority vote requirement

in primary elections had a significant adverse effect on black voters and candidates.

II. STANDARD OF REVIEW

The issue of whether an election system was established or maintained for a discriminatory purpose is a question of fact subject to the clearly erroneous standard of review. *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982). Rule 52(a) of the Federal Rules of Civil Procedure is particularly relevant to our review of the district court's findings on purpose. Rule 52(a) requires that in reviewing the district court's factual findings, we must give due regard to the court's opportunity to judge the credibility of witnesses. Fed. R. Civ. P. 52(a).

We review the district court's determination of whether the majority vote requirement has had a discriminatory impact for clear error. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (stating that "application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law"). Thus, while we review the district court's conclusions of law *de novo*, *Davis v. Chiles*, 139 F.3d 1414, 1420 (11th Cir. 1998), the Supreme Court has clarified that the clearly erroneous standard applies to the district court's ultimate conclusion as to whether an election mechanism leads to discriminatory results. *Gingles*, 478 U.S. at 79. The trial court "is to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally

open" to minorities. *Id.* (citations and quotations omitted). In conducting our review of the district court's decision, we have the "power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Id.* (citations omitted).

III. ANALYSIS OF FACTUAL FINDINGS

A. *Discriminatory Purpose*

The district court found that the majority vote requirement was not passed for a discriminatory purpose and that the key supporters of the requirement had good government reasons for their support. There is adequate support in the record for this finding, and we hold that it was not clearly erroneous. The district court credited the testimony of Governor Sanders who explained that prior to the passage of the 1964 election code, Georgia elections were "in a state of chaos." (1st Supp. R., vol. 4, 167). Some counties used a plurality system, while others had a majority vote requirement. *Id.* Election fraud was pervasive throughout the state, including the use of "stalking horses" in elections where only a plurality was required for victory. *Id.* at 167-69. In addition, according to Governor Sanders, incumbents frequently attempted to "muddy the water" by getting as many people as possible to run in their races to dilute the opposition vote and win a plurality. *Id.* at 170.

The district court also credited the testimony of other witnesses to the effect that the majority vote requirement was not motivated by an intent to discriminate on the

basis of race. Eugene Patterson, an anti-segregationist who was editor of *The Atlanta Constitution* in the early sixties testified that Sanders was not racist in his attitudes and that the 1964 code, including the majority vote provision, was passed for legitimate government reasons and not to discriminate against black voters and candidates. (R., vol. 15, 447-49). George T. Smith, Speaker of the House during the Sanders administration, testified that there was no discussion of discrimination against black candidates in connection with the Sanders administration's support for majority voting. (1st Supp. R., vol. 5, 77). Melba Williams, a member of the third ELSC, whom no one suggests was racially motivated in her support for majority voting, testified that the committee's decision to include a majority voting provision in the ELSC's proposed code had nothing to do with race. (1st Supp. R., vol. 5, 137-40).

Plaintiffs contend that the district court clearly erred in failing to impute the discriminatory motives behind Groover's 1963 majority vote bill to the supporters of the 1964 election code's majority vote provision. However, Governor Sanders testified that Groover, who had supported his opponent in the governor's race, had "nothing to do with" the comprehensive 1964 election reform law. (1st Supp. R., vol. 4, 195). This testimony as to Groover's lack of input in the 1964 bill was corroborated by Smith. (1st Supp. R., vol. 5, 74-77). It appears that Plaintiffs' emphasis on the discriminatory intent of Groover in connection with majority voting is necessitated by the lack of evidence that the proponents of the 1964 election code had racially discriminatory motives for their support of the majority vote provision. One of the Plaintiffs' experts

admitted on cross examination that in his review of all of the records of the third ELSC that produced the 1964 election code, he did not find any evidence of a "smoking gun," meaning evidence providing a clear link between the majority vote provision in that code and race discrimination. (R., vol. 14, p. 187). The Plaintiffs' theory was that a discriminatory purpose behind the 1964 provision could be inferred circumstantially from the improper motives behind Groover's previous majority vote bill, from the third ELSC's proposal of a modified literacy test, and from evidence that Sanders' support of previous measures, such as at-large voting, was racially motivated. The district court did not commit clear error by rejecting this theory and focusing instead on specific evidence concerning how and why the majority vote rule was included in the 1964 election code.

B. *Discriminatory Impact*

With respect to Plaintiffs' allegation that the challenged provision discouraged blacks from running for office, the district court heard testimony from three witnesses who had held office in Georgia, including Plaintiff Tyrone Brooks, a state legislator from Atlanta. These witnesses testified to the effect that the majority vote law was a deterrent for many potential black candidates. Although two of these witnesses gave a few specific examples of black individuals they had talked to who said that they were discouraged by the prospect of a primary runoff, the district court found that this evidence gave only minimal support for the theory that black candidates were deterred by the possibility of a runoff

before entering an election. This evidence did nothing to bolster the theory that the potential for a runoff was more of a deterrent for black candidates than for white candidates.

On the question of whether the Plaintiffs proved that the majority vote requirement had a significant, adverse effect on black candidates, the district court found that the racial impact of the majority vote requirement has been negligible at most. The court considered the fact that the requirement caused a net loss of 27 black nominees over 25 years and that there was no negative impact on black candidates in roughly 99 percent of all runoffs during this period. The district court's finding that the majority vote law does not have a discriminatory effect on black candidates has strong support in the record and therefore is not clearly erroneous.

IV. LEGAL ANALYSIS

B. *Section 2 of the Voting Rights Act*

With respect to the Plaintiffs' claim under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the district court concluded that Georgia's majority vote requirement for primary elections does not violate § 2.

1. Discriminatory Purpose

Plaintiffs argue that a showing of discriminatory purpose alone is sufficient for a violation of § 2. The Plaintiffs' claim under this theory fails for two reasons. First, as discussed above, we affirm the district court's factual finding that the majority vote requirement contained in

the 1964 election code was not motivated by a discriminatory purpose. Second, even if we found clear error in the district court's finding on discriminatory purpose, we are bound by *Johnson v. DeSoto County Bd. of Comm'rs*, 72 F.3d 1556 (11th Cir. 1996), which held that discriminatory intent alone, in the absence of a showing of discriminatory effect, is insufficient to establish a violation of § 2. *Id.* at 1561. We will, therefore, focus our discussion on the "results test" for § 2 violations.

2. Discriminatory Results

Congress amended § 2 in 1982 to clarify that a violation of this statute may be proved by a showing of discriminatory results alone, thereby superceding *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held that a plaintiff had to show both a discriminatory purpose and a discriminatory effect to establish a violation. Section 2, as amended, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to

> participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C.A. § 1973. The Senate Judiciary Committee Majority Report accompanying the 1982 amendment listed a number of factors that may show a § 2 violation.[3]

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[3] The "typical factors" listed in the Senate Report are as follows:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of

Though the test for § 2 violations is generally flexible and fact-intensive, the Senate Report placed three limits on the way § 2 violations may be proved. *Gingles*, 478 U.S. at 46. First, electoral devices such as at-large elections, or in this case, a majority vote requirement, do not violate § 2 per se. *See id.* Those challenging an electoral device must prove that under the totality of the circumstance, the device "result[s] in unequal access to the electoral

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discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; [and]

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and]

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S.Rep. No. 97-417, 97th Cong. 2nd Sess. 28, 28-29 (1982), U.S.Code Cong. & Admin.News 1982, pp. 206-207. The Senate Committee clarified that " 'there is no requirement that any particular number of factors be shown, or that a majority of them point one way or the other.' " *Gingles*, 478 U.S. at 45 (quoting S.Rep. No. 97-417 at 29).

process." *Id.* Second, a violation of § 2 cannot be established by showing "the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone." *Id.* Finally, plaintiffs must prove the existence of racial bloc voting. *Id.* The results test does not assume it. *Id.*

a. Applicability of the *Gingles* prerequisites

The *Gingles* case involved a vote dilution claim against the use of multi-member districts. In this context, the Supreme Court developed three prerequisites for a claim of vote dilution. *Gingles*, 478 U.S. at 50. The Supreme Court has not heard any challenges to majority vote requirements, though such challenges have been presented in lower federal courts.[4] Because the requirement of a majority of the votes in a primary election is distinct from the establishment of a multi-member district

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[4] In *Whitfield v. Democratic Party of the State of Arkansas*, 686 F. Supp. 1365 (E.D. Ark. 1988), *aff'd by equally divided court without opinion*, 902 F.2d 15 (8th Cir. 1990) (en banc), a district court held that Arkansas' majority vote requirement for primary elections did not violate § 2 of the Voting Rights or the Fourteenth and Fifteenth Amendments to the United States Constitution. In another challenge, a three-judge panel held that Arkansas' majority vote provision for general elections was unconstitutional, but rejected the constitutional attack on the majority vote requirement as applied to primary elections. *Jeffers v. Clinton*, 740 F. Supp. 585, 594-95 (E.D. Ark. 1990) (reasoning that the primary runoff represents a legitimate means to ensure that the nominee has a majority of party support and that a runoff is not necessary in a general election because there are almost never more than two substantial candidates).

such as that at issue in the *Gingles* case, Georgia's majority vote provision does not fit neatly into the analytical framework set out in *Gingles*. *See Whitfield*, 686 F.Supp. at 1374-75 (stating that it "is doubtful" that the *Gingles* prerequisites would be emphasized in a challenge to a runoff requirement).

Nonetheless, we agree with the district court that, with slight modification, the three prerequisites for the results test set out in *Gingles* are applicable to this case. *Gingles* calls for a flexible, fact-intensive inquiry into whether an electoral mechanism results in the dilution of minority votes, and the Court in *Gingles* recognized the "potentially dilutive" effect of majority vote requirements. *See* 478 U.S. at 46, 56.

b. Analysis under *Gingles*

The Court in *Gingles* developed the following three threshold requirements for establishing a violation of § 2: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) "the minority group must be able to show that it is politically cohesive;" and (3) "the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50. These three circumstances are "necessary preconditions" for a showing that an electoral scheme impaired minority voters' ability to elect their chosen representatives. *Id.* Once plaintiffs establish the three prerequisites, they must go on to show that, under the totality of the circumstances, they have

been denied an equal opportunity to elect representatives of their choice. *Nipper v. Smith*, 39 F.3d 1494, 1512 (11th Cir. 1994).

i. The first *Gingles* prerequisite

The first prerequisite essentially "asks whether the court can fashion a remedy for a demonstrated abridgement." *Nipper*, 39 F.3d at 1511. If the plaintiffs in a § 2 case cannot show the existence of an adequate alternative electoral system under which the minority group's rights will be protected, then the case ends on the first prerequisite. *See id.* at 1511 n.34. In its analysis under the first prerequisite, the district court determined that "[t]he analogous question in the case at bar is whether black voting strength would be 'less diluted' under some workable regime other than a strict majority vote requirement." (R., vol. 12, Tab 165, 22). This is a proper interpretation of the first *Gingles* prerequisite as applied to Georgia's majority vote provision.

The district court found that the Plaintiffs failed to establish the first *Gingles* prerequisite because they did not prove that any alternative to the majority vote requirement would result in a net increase of black elected officials. Under a 45 percent plurality rule, like that in place in Georgia's general elections, there would have been a net *loss* of one black primary winner between 1970 and 1995. Although the evidence demonstrated that under a pure plurality system in Georgia primaries, there would have been a net increase of 27 black nominees for political office during the same period, "[i]n assessing a plaintiff's proposed remedy, a court must look to the

totality of the circumstances, weighing both the state's interest in maintaining its election system and the plaintiff's interest in the adoption of his suggested remedial plan." *Davis v. Chiles*, 139 F.3d 1414, 1419-20 (11th Cir. 1998) (citing *Houston Lawyers' Ass'n v. Attorney Gen'l of Tex.*, 501 U.S. 419 (1991)). As Defendants pointed out, a pure plurality system such as that suggested by Plaintiffs could theoretically result in a candidate's winning with 1% of the vote if enough candidates entered the race. Obviously, this type of result would seriously undermine the legitimacy of the government, and the state has a substantially compelling interest in preventing this from occurring. Particularly when balanced against the average of only one additional nominee per year statewide over the past twenty-five years that would have resulted from a pure plurality system, the district court could properly conclude that the harm resulting from Plaintiffs' proposed remedy is simply too great to justify ordering such a system. Accordingly we hold that the district court did not err in concluding that Plaintiffs failed to establish an adequate remedy. Because Plaintiffs fail on the first prerequisite, the case under § 2 could end here. *Nipper*, 39 F.3d at 1511 n. 34. Nevertheless, we will review the remainder of the district court's § 2 analysis.

ii. The second and third *Gingles* prerequisites

The district court dealt with the second and third *Gingles* factors together, concluding that the Plaintiffs

failed to meet either requirement. The second prerequisite requires a showing that the minority group is politically cohesive, while the third calls for proof of majority white bloc voting sufficient to defeat the minority's preferred candidates. *Gingles*, 478 U.S. at 50. In other words, these prerequisites ask whether voting is racially polarized and, if so, whether the white majority is usually able to defeat the minority bloc's candidates. In the absence of minority political cohesion and significant white bloc voting, it would be difficult, if not impossible, to prove dilution of minority votes in violation of § 2. *See Nipper*, 39 F.3d at 1533.

The district court, while acknowledging Georgia's notorious history of official discrimination against black voters as well as the possibility "that racially polarized voting is the norm in Georgia," found that the Plaintiffs failed to carry their burden of proof on the question of racial polarization. (R., vol. 12, Tab 165, 23). The district court went on to state that even if the Plaintiffs had proven racially polarized voting, they failed to show that the purported white voting bloc "usually" defeated the purported minority bloc's candidates under the majority vote system. *Id.* at 24.

In discussing the proper legal standard for analysis of racial polarization, the *Gingles* Court explained that "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." 478 U.S. at 56. We agree with the district court that the statistical evidence offered by the Plaintiffs did not support the proposition that the white voting bloc normally defeated the candidate supported by most black

voters. Runoffs caused by Georgia's majority vote law occur in only a small fraction of all primaries in the state. Thus, even if there were a significant racial impact in the context of all runoffs, it could not be said that the white majority usually defeats the minority's preferred candidate under Georgia's primary runoff system. Moreover, the majority vote law had no net adverse racial impact on black candidates in roughly 99 percent of all runoffs over a 25 year period. We therefore affirm the district court's conclusion that Plaintiffs failed to prove that white bloc voting "usually" leads to the defeat of black voters' preferred candidates under the majority vote scheme.

Plaintiffs criticize the district court's analysis under the second and third *Gingles* factors as containing "an extraordinary inconsistency." (Plaintiffs' brief at 36.) The alleged inconsistency lies in the following passage of the district court's order:

> Rather than demonstrating to the court that black primary winners would be capable of winning general elections, plaintiffs have made every effort to convince the court that voting in Georgia is so polarized that racial minorities cannot win in majority white districts. Accepting their arguments as true, a plurality primary system would not increase "the potential [of blacks] to elect representatives in the absence of the challenged structure."

(R., vol. 12, Tab. 165, 23 (quoting *Gingles*, 478 U.S. at 50 n. 17)). The district court did make a factual finding that the Plaintiffs failed to prove racially polarized voting. We do not, however, agree with the Plaintiffs that the district court's reasoning was logically flawed merely because it

assumed, *arguendo,* that voting was as racially polarized as the Plaintiffs attempted to demonstrate for purposes of the second and third *Gingles* prerequisites.

Rather, the Plaintiffs themselves have advocated conflicting positions on the question of racially polarized voting. Georgia maintains the majority vote requirement only for primary elections. To succeed on the first *Gingles* prerequisite, the Plaintiffs must demonstrate that if an alternative system such as a pure plurality were in place, more black candidates would in fact be elected to office. This, however, would require proof of substantial white crossover voting in general elections which is very difficult to achieve in conjunction with a showing, required by the second and third *Gingles* prerequisites, that voting is so racially polarized that the white majority, voting as a bloc, has the ability to defeat the minority's preferred candidates. In an effort to walk that fine line, the Plaintiffs point to the fact that there was "a minimal level of" white crossover voting, to the success of some black candidates in runoffs in majority white jurisdictions, and to the testimony of former Atlanta mayor Maynard Jackson. (Plaintiffs' brief at 36). Jackson testified that in his opinion, if a black candidate could win the primary, he or she would gain the support of the Democratic party, obtaining an advantage in the general election. (R., vol. 13, 79-80.) The district court did not consider this evidence sufficient proof of Plaintiffs' theory that those black candidates who are only capable of winning a primary under a pure plurality system would in fact go on to defeat their opponents in the general election.

Overall, the district court concluded that under the totality of the evidence presented by the parties, Georgia's majority vote requirement does not "eviscerate[ ] the ability of minority voters to elect their candidates of choice." (R., vol. 12, Tab 165, 24 (citing *Nipper*, 39 F.3d at 1512)). Detecting no errors of law in the district court's analysis, we affirm under the clearly erroneous standard the district court's ultimate finding that the majority vote law does not yield racially discriminatory results. *See Gingles*, 478 U.S. at 79 (stating that clearly erroneous standard applies to ultimate finding of vote dilution).

B. *Constitutional Claims*

To make out a constitutional claim against the majority vote requirement, which is racially neutral on its face, Plaintiffs must demonstrate that the provision was motivated by a discriminatory purpose under the analysis used by the Supreme Court in *Hunter v. Underwood*, 471 U.S. 222, 225 (1985). The Court in *Hunter* held that the test set out in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977) applies to the determination of whether voting statutes are unconstitutional because of a discriminatory purpose. *Hunter*, 471 U.S. at 232. Under this test, a court must first determine whether the discriminatory motive was a "substantial factor" or a "motivating factor" behind a governmental decision. *Mt. Healthy*, 429 U.S. at 287. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without

this factor." *Hunter*, 471 U.S. at 228 (quoting *Mt. Healthy*, 429 U.S. at 287).

The district court found that discrimination was not a substantial or motivating factor behind enactment of the majority vote provision. As previously discussed in our factual analysis, we conclude that this finding is not clearly erroneous. The district court explained that although it was evident that "the virus of race-consciousness was in the air," Plaintiffs failed to prove that "the specific measure at issue here – the majority vote requirement in the 1964 election code – was infected thusly." (R., vol. 12, Tab 165, 26).

The court went on to state that even if the Plaintiffs had proven that race-conscious reasons were a substantial or motivating factor behind the challenged law, Defendants have shown that it would have been enacted even in the absence of those reasons. We agree that the Defendants demonstrated that the supporters of the 1964 majority vote provisions had ample "good government" reasons and that the law would have been passed in the absence of any discriminatory motive. Plaintiffs argue that the district court placed too much emphasis on the motivations of Governor Sanders and his administration, in light of the fact that the entire Georgia legislature enacted the code which contained the majority vote provision. However, the Defendants' evidence persuaded the district court that Sanders wielded enough power in the legislature not only to install one of his friends and allies as Speaker of the House, but also to effectuate the passage of the 1964 election code. The Defendants proved

that legitimate "good government" reasons were the primary motivating factor behind the majority vote provision's key proponents, including Sanders, and that the Sanders administration had sufficient power over the legislature to have the 1964 election code enacted. Even if some of the legislators who eventually voted the 1964 code into law had discriminatory reasons for their support, the Plaintiffs' constitutional claims fail under the "but for" test set out in *Hunter* and *Mt. Healthy*.

Plaintiffs critique the district court's fact finding on the question of discriminatory purpose, citing *Arlington Heights* for the proposition that the district court erred in relying heavily on the testimony of decision makers involved in the passage of the majority vote provision. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977) (stating that in "extraordinary instances the members [of a decision making body] might be called to the stand at trial to testify concerning the purpose of the official action"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (expressing concern that after-the-fact reconstructions of legislative purpose can be self-serving and unreliable and cautioning that such recollections should be viewed critically). Plaintiffs contend that the district court should have placed more emphasis on the contemporaneous record relating to the legislation. *See Hunter*, 471 U.S. at 228-29; *Overton Park*, 401 U.S. at 420.

While the Plaintiffs are correct that the contemporaneous record should factor heavily into a trial court's determination of legislative purpose, the district court did in fact consider evidence of the legislative history of

the 1964 majority vote provision. To the extent the Plaintiffs contend that newspaper evidence is part of the contemporaneous record and should, therefore, be the primary source for ascertaining legislative intent, we reject this theory. News articles often contain multiple layers of hearsay and do not trump the sworn testimony of eyewitnesses. In ascertaining legislative purpose, a trial court operates under the same rules of evidence that control in any case. The *Arlington Heights* Court explained that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. In our view, the district court's review of the available evidence constituted the "sensitive inquiry" required by *Arlington Heights*. The court analyzed the history of the 1964 majority vote provision and considered the ELSC reports, specifically acknowledging that relevant considerations of discriminatory purpose "include the historical background of the challenged act, the 'specific sequence of events' leading up to the act's passage, and the legislative history of the act, 'especially where there are contemporaneous statements by members of the decisionmaking body, minutes of its meeting, or reports' " (R. vol. 12, Tab 165, 25 (quoting *Arlington Heights*, 429 U.S. at 266-68)).

Although Plaintiffs offered evidence of racially discriminatory intent from the first two ELSCs appointed by Governor Sanders' predecessors, this evidence did not address why the 1964 code's majority vote provision was passed. The evidence included the unpurged records of the ELSC that proposed the 1964 code, (R. vol. 9, Tab 151, 2), and the Plaintiffs' own expert admitted on the stand

that nothing in these records provides a clear link between race and the majority vote provision. (R., vol. 14, p. 187). There was evidence of explicit racial considerations on other issues in the third ELSC's records, as well as in the records of the previous ELSC's. However, the clear historical trail of racial purpose on other issues and in previous committees stands in stark contrast with the *absence* of evidence of racial purpose in connection with the majority vote proposal in the third ELSC's records. This contrast supports the district court's finding that the challenged provision was not racially motivated.

Because we affirm the district court's finding that race was not a substantial purpose behind the majority vote law, we need not address the Plaintiffs' contention that even if the racial impact of the majority vote provision is insignificant, it can be invalidated as unconstitutional and in violation of § 2 of the Voting Rights Act if race was a predominant purpose behind its adoption.

V. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-9284

TYRONE BROOKS, LANETT STANLEY, et al,

Plaintiffs-Appellants,

versus.

ZELL MILLER, Governor of Georgia,
GEORGIA STATE BOARD OF ELECTIONS, et al,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

(Filed Dec. 31, 1998)

Before: DUBINA and MARCUS, Circuit Judges, and PROPST*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service

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* Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation:

on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TYRONE BROOKS, et al.	:	1:90-cv-1001-RCF
vs.	:	
ZELL MILLER, et al.	:	

ORDER

(Filed Sept. 26, 1996)

This voting rights action came before the court for a bench trial in May of 1996. Having considered all the evidence, the court now enters the following findings of fact and conclusions of law and rules that judgment be granted in favor of defendants.

I. BACKGROUND

Plaintiffs are 27 black Georgia residents and votes who allege that the majority vote requirement for elections in Georgia, O.C.G.A. § 21-2-501, was enacted for the purpose of discriminating against black voters and has resulted in the dilution of their voting strength, in violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution. The complaint has been certified as a class action on behalf of all black registered voters in Georgia, present and future.

O.C.G.A. § 21-2-501 originally provided in relevant part that "no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a

majority of the votes cast to fill such nomination or public office." In the event that no candidate received a majority of the vote, a runoff primary or general election was to be held between the candidates receiving the two highest numbers of votes. In 1994, after the filing of this action, Georgia's General Assembly repealed the majority vote requirement for all general elections, except those for certain constitutional offices not at issue here, and replaced it with a 45% plurality rule. The 1994 amendment retained the majority vote requirement for primary elections. Plaintiffs do not challenge the new plurality rule for general elections, nor do they challenge majority voting as it affects multi-member offices such as county commissions and school boards. Rather, plaintiffs' remaining claims concern the majority vote requirement for party nominations of single member, county-level offices, members of the General Assembly, superior court judges and district attorneys, and judges and justices of the Georgia Court of Appeals and Georgia Supreme Court.

Shortly after filing their complaint, plaintiffs sought a preliminary injunction against continued use of the majority vote requirement. The court held a five-day hearing in July of 1990 and then denied plaintiffs' motion. *See* Order of July 17, 1990. Shortly thereafter, the Department of Justice filed an action asserting essentially the same claims as plaintiffs in this case, *United States of America v. State of Georgia et al.*, Civil Action No. 1:90-cv-1749-RCF (N.D. Ga. 1990), and the two cases were consolidated. The parties to the two actions attempted to settle their claims and other claims in a related action in the Southern District, *Brooks v. State Bd. of Elections*, 848

F. Supp. 1548 (S.D. Ga. 1994), *appeal dismissed*, 59 F.3d 114 (11th Cir. 1994) [*Brooks I*], but Chief Judge Edenfield rejected the proposed settlement. The United States then dismissed its complaint in the 90-cv-1749 companion case, *see* Order of January 30, 1996, and the instant case proceeded to trial.

II. FINDINGS OF FACT

A. General History of Racial Discrimination in Georgia's Voting Practices

The State of Georgia has a long history of racial discrimination at all levels. As Judge Edenfield noted in his opinion in *Brooks I*, "[t]his discrimination was ratified into state constitutions, enacted into state statutes, and promulgated in state policy. Racism and racial discrimination were apparent and conspicuous realities, the norm rather than the exception." 848 F. Supp. at 1560. Racism has tainted Georgia's voting procedures, as well, resulting in such discriminatory practices as barring blacks from voting altogether, requiring property ownership or the passage of a literacy test as a prerequisite at the polls, and holding "whites only" primary elections. Additionally, black voting power has been diluted in a variety of ways, including the use of the county unit system, effective until 1962, to undermine the voting strength of counties with large black populations and the drawing of voting districts so as to discriminate against black voters.[1]

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[1] The general history of discrimination in voting in Georgia has been detailed in numerous other judicial opinions, *e.g.*,

B. The Passage of the 1964 Election Code's Majority Vote Provision

The provision of Georgia law at issue here was part of a sweeping election code approved by the General Assembly on June 22, 1964, and signed into law by then-Governor Carl E. Sanders two days later. This law was the first election code in Georgia's history. Plaintiffs contend that the majority-vote provision in the law was motivated by racial animus; defendants maintain that the law was enacted for legitimate (i.e., "good government") reasons. In outlining the history of the passage of this law, the court draws upon the following sources of evidence: (1) testimony from the trial of this action; (2) testimony from the 1990 preliminary injunction hearing; (3) selected testimony from *Georgia v. Reno*, 881 F.Supp. 7 (D.D.C. 1995), submitted by defendants; (4) depositions taken in this action; (5) newspaper articles and other trial exhibits, and (6) the reports of Steven F. Lawson and J. Morgan Kousser, plaintiffs' academic experts.[2]

Prior to the passage of the 1964 law, the state of elections and election laws in Georgia was chaotic. Georgia's elections were marked by corruption and manipulation, and there were few laws to check such practices. Throughout the state, and in rural counties in particular, local elections were controlled by groups referred to as

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Rogers v. Lodge, 458 U.S. 613 (1982); *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966), and need not be detailed here.

[2] Reconstructing history – in particular, reconstructing historical motivations – is always a hazardous endeavor. Nevertheless, the court has attempted to do so judiciously, based upon the evidence if found most credible.

"courthouse crowds" which consisted of various office holders and politicos at the county courthouses. The courthouse crowds were comprised almost exclusively of Democrats, as Georgia was then a one-party state: nomination in the Democratic primary was tantamount to election, and Republican candidates were rare. The elections that kept the courthouse crowds in power were run by the local Democratic executive committees in each county, who set most of the rules governing primary elections, including qualifying fees, dates, polling places, and whether election would be by majority vote or plurality vote. These rules – including the majority/plurality vote rules – varied from county to county and from election to election.[3]

The court house crowds sometimes manipulated elections by using plurality voting to retain their power. For example, spurious candidates called "stalking horses" were entered into local races to split the opposition vote and assure victory to candidates from the courthouse crowds – even though those candidates may have been opposed by a majority of the voters. This phenomenon occurred in the 1962 lieutenant governor's race, in which state senator Carl E. Sanders ran against Peter Zack Geer. Geer planned to enter a man named Carl *F.* Sanders in the

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[3] There were a few exceptions to the local committee option. For example, state law provided that nomination of members to the General Assembly and judges to the Superior Court in counties having more than 200,000 residents (i.e., Fulton) was by plurality vote; and that counties having a population of not less than 18,524 and not more than 18,540 (in reality, only one) were required to nominate candidates for all county offices by majority vote.

race to create confusion and split the opposition vote, thereby assuring Geer of garnering a plurality and winning the election. As it happened, Sanders withdrew from the race, ran for governor instead, and won that election.

Georgia began the process of election law reform in 1957, when the legislature created the first Election Laws Study Committee [ELSC]. Although the stated purpose of the ELSC – and, in truth, a major purpose thereof – was to study ways to standardize and modernize Georgia election procedures, there were racist themes, as well. Georgia's racially discriminatory political system was under sharp assault by the civil rights movement. Congress had enacted a federal civil rights law that year authorizing the Justice Department to bring civil suits for injunctive relief against registrars who obstructed the efforts of blacks to register to vote.[4] At the same time, the Southern Christian Leadership Conference and the NAACP began conducting voter registration drives throughout the South, as well as boycotts, sit-ins, freedom rides, marches, and demonstrations. Although charged with the task of reforming Georgia's crazy-quilt election practices, the ELSC members were also interested in preserving the discriminatory status quo against the prospect of increased black voter registration. For example, in discussing whether to modify the literacy test for voting, one of the committee members remarked that white voters would be willing to tolerate the inconveniences

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[4] The first case brought under the 1957 law arose in Terrell County, Georgia, and resulted in a successful verdict for the federal government. *See United States v. Raines*, 362 U.S. 17, (1960). *Raines* challenged Georgia's literacy test for voting.

associated with the test to ensure that illiterate black voters did not make it onto the registration lists. Additionally, the committee vice-chairman noted that some individual committee members might feel that the literacy test was necessary to curb the ability of black voters to marshal "bloc" power. The ELSC ultimately recommended a new, 30-question literacy exam, which was signed into law in 1958. However, the committee apparently failed to accomplish its full purpose, as no comprehensive election code was enacted as a result of its efforts.

Several years later, in the spring of 1962, a three-judge panel of this court struck down Georgia's county unit system as unconstitutional. *See Sanders v. Gray*, 203 F.Supp. 158 (N.D. Ga. 1962). That system, mentioned above, gave each Georgia county twice as many unit votes as it had representatives in the Georgia House for the purpose of nominating candidates for statewide office. Thus, the 121 Georgia counties containing a minority of the population controlled nearly 60% of the unit votes, and the voting power of urban areas was diluted. The county unit system was widely viewed as a way to maintain rural domination of the state legislature and to restrict black political influence in the electorate.

In 1963, state representative Denmark Groover of Macon introduced a majority vote bill in the Georgia House of Representatives. Groover, a staunch segregationist, was passionately opposed to "bloc voting," a euphemism for blacks voting in a bloc, both because of his racial prejudices and because of his defeat in the 1958 contest for the legislature. Groover carried the white vote in that election, but he had not been endorsed by the

black slatemakers in Macon and therefor won only 16.4% of the black vote, thus failing to achieve a plurality. Groover identified a majority vote requirement as a way to hamper bloc voting, and he embarked upon a crusade to pass a majority vote requirement in Georgia. Groover sold his plan to the House as a means of thwarting election control by blacks, and the bill passed handily. The bill was then sent to the Georgia Senate, where it died in committee. Although Groover later recalled his support for the majority vote requirement in race-neutral terms – speaking of his opposition to endorsement sheets by organized groups – it is clear that racial antipathy underlay that support.

The majority vote issue resurfaced, however, in the work of the third ELSC,[5] which was formed in 1963 at the behest of newly-elected Governor Sanders for the purpose of drafting an election code to propose to the General Assembly. The third ELSC retained some of the same members as its two predecessors but also included newer, more racially moderate members. The committee recommended a majority vote requirement, among other measures, and the General Assembly ultimately adopted most of these recommendations, including the majority vote requirement. Plaintiffs attempt to characterize the third ELSC's endorsement of majority voting – and the General Assembly's adoption thereof – as a direct descendant of Groover's recently defeated bill and, thus, racially motivated. However, the evidence paints a somewhat more complex picture.

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[5] A second ELSC had been formed in 1961 but dissolved without taking action.

The election code's other features, aside from the majority vote requirement, were a mixed bag of racially tinged and racially neutral measures. One discriminatory measure recommended by the third ELSC was a revision of the 30-question literacy test. The committee initially proposed that the test be dropped altogether to improve Georgia's image and reduce its vulnerability to federal civil rights litigation. But, the committee also recommended making it a felony to assist anyone in casting a vote – a measure which would, as a practical matter, have rendered the ballot itself a literacy test. Public opinion ran strongly against abandonment of the literacy test, and the third ELSC later succumbed to pressure and advocated retaining a scaled-down version. The Senate, at the urging of Georgia's sole black senator, proposed an easier, six-question test. However, the House – whose version ultimately became law – voted to adopt a test containing 20 questions and requiring a score of 75% to pass. Other proposals debated by the third ELSC that were aimed at excluding blacks from voter rolls included requiring party registration for voting in a primary, disfranchisement of persons convicted of certain crimes involving moral turpitude, and requiring new voter applicants to appear personally before the local board of registrars to qualify.

However, some reforms that wound up in the new code were clearly unrelated to race. For example, the law required that a voting registrar be present during all business hours at the county courthouse, that the names of voters who had died or moved out of the jurisdiction be purged from the rolls, and that voter registration

remain open until 50 days prior to an election. By facilitating voter registration and fair elections, these provisions benefitted black and white alike. Thus, while the law's literacy test was a clear effort to block black voter registration, it cannot be said that the law as a whole was purely racist.

Many of the key backers of the 1964 law's majority vote requirement had "good government" motivations: they wanted to eliminate the use of stalking horse and dummy candidates and to loosen the courthouse crowds' grip on political power. One of those backers was Governor Sanders, who focused on election law reform in his 1962 gubernatorial campaign, appointed the third ELSC, and avidly supported majority voting.[6] Sanders was considered a racial moderate at the time: he opposed the civil rights movement, but he also steered clear of militant segregationists like Groover.[7] Sanders held considerable sway over the General Assembly. He appointed the chairmen of house committees; he was able to influence the legislature's agenda; and he installed his friend George T.

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[6] Several individuals testified that Sanders' support of majority voting was not racially motivated. These included Eugene Patterson, then-editor of *The Atlanta Constitution* and an anti-segregationist; George Smith, Speaker of the House under the Sanders Administration; and Leroy Johnson, the first black member of the Georgia Senate. Additionally, Melba Williams, a member of the third ELSC whom no one suggests was racially motivated, testified that the committee's decision to recommend majority voting had nothing to do with race.

[7] Sanders is perhaps best described as a pragmatist. He saw that the era of segregation in Georgia was passing, and, while he did not endorse that passage, he wanted it to be as painless as possible.

Smith as speaker of the house. Smith also supported a majority vote rule, both for good-government and for personal reasons. Smith wanted to run for lieutenant governor in 1966 against incumbent Peter Zack Geer but feared he could not beat Geer under the plurality system.[8]

Plaintiffs make several arguments in support of their thesis that the 1964 law's majority vote requirement was racially motivated. First, they claim that Denmark Groover's racial antipathy, the basis for his 1963 majority vote bill, must be imputed to the supporters of the 1964 law's majority vote requirement. However, Groover played no role in the Sanders administration, was not a member of the third ELSC, and had little or no influence upon the committee. Indeed, Groover was in the opposite camp by virtue of his support of Sanders' opponent in the gubernatorial race, Marvin Griffin. The court, therefore, will not attribute Groover's racist motives to the supporters of the 1964 law's majority requirement.

Plaintiffs also argue that racism was evident in the General Assembly's refusal to delay implementation of the majority vote provision. The 1964 Fulton County Superior Court race, slated to be a plurality election, was already in progress when the Georgia Senate took up the third ELSC's recommended election code. Three candidates had entered the judgeship race: a racial moderate,

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[8] Smith won the election under the majority vote system. Geer led in the Democratic primary but did not get a majority; Smith won the runoff. Smith, a far more progressive candidate, estimated that 95-96% of the black voters voted for him, enabling him to beat Geer.

an avowed segregationist, and a black civil rights lawyer named Donald Hollowell. Hollowell hoped the white vote would split, enabling him to win a plurality; he saw little chance of success in a runoff. Accordingly, two senators proposed postponing implementation of the majority vote requirement until 1965 so that ongoing races – including the Fulton County judicial race – would not be affected, but these proposals were defeated. Nevertheless, implementation of other features of the 1964 law *was* deferred. Although anti-black sentiment may have played a role in the Senate's refusal to delay, the court finds that that role was slight.[9]

Plaintiffs also contend that some of the members of the third ELSC opposed majority voting. For example, J. B. Fuqua, a member of the third ELSC and chairman of the state Democratic Party, initially supported plurality voting. After Sanders came out publicly in favor of majority voting, Fuqua, a close ally of Sanders, clarified that his support for plurality voting extended only to local elections. Fuqua's reservations about a majority voting requirement were based largely upon his belief that counties could not shoulder the financial burden of holding runoff elections. Another committee member, William Schloth, favored a plurality requirement, also primarily for financial reasons. There is no evidence that Fuqua and Schloth believed that a plurality system would be more hospitable to black candidates. Their support for plurality

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[9] This finding is strengthened by the fact that Hollowell proved to be a weak candidate: he placed third in the initial race and, therefore, would have lost under either a plurality or a majority system.

voting shows only that "good government" arguments could be made – and were made – for both systems.

Finally, plaintiffs point to the majority vote requirement in the Senate redistricting plan of 1962. That year, a three-judge panel of this court declared unconstitutional Georgia's practice of apportioning members of the Senate on the basis of geographical area rather than population. *See Toombs v. Fortson*, 205 F.Supp. 248 (1962). Sanders, who had won the Democratic gubernatorial primary in September but was still president *pro tem* of the Senate, led lawmakers in redesigning district boundaries and crafting new procedures for electing representatives. Sanders supported countywide elections in counties with more than one senator. Plaintiffs point to a statement by Sanders' floor leader, Guy Rutland, that Sanders favored at-large elections "to avoid the possible election of a Negro senator from Fulton." *Showdown Nears on Revised Bill*, Cordele Dispatch, Oct. 4, 1962, at 1. Many lawmakers feared that Leroy Johnson, a black lawyer, would run for a Senate seat from his predominantly black district, and they believed his odds of success would diminish if he were forced to run for one of seven seats in a countywide contest.[10] It appears that Sanders' advocacy of at-large elections was, indeed, racially motivated. However, Sanders also had good government reasons for supporting at-large elections: he believed that electing senators

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[10] As it happened, Johnson won a plurality in the countywide primary. Before the runoff was held, however, a state court judge ruled that at-large senate primaries violated the Georgia Constitution, *see Finch v. Gray*, No. A96441 (Fulton Co. Sup. Ct. 1962), and Johnson was declared the nominee from his district.

from the same county by districts would lessen the obligation of individual senators to serve the county as a whole, and he thought senators elected on a county-wide basis would be more effective in collaborating with House members, who were also elected at-large.

C. The Impact of the Majority Vote Law

The parties' evidence regarding the impact of the majority vote law falls into two general categories – testimony about the law's impact on individuals who are considering running for office and statistical analyses of data demonstrating the law's effect on actual political contests. The court considers each category in turn.

1. The Majority Vote Law as a Deterrent of Black Candidacies

Maynard Jackson, former mayor and vice mayor of Atlanta, testified that the majority vote law deters blacks from running for office. He explained that, in his opinion, black candidates who might be capable of garnering a plurality of the vote in a primary election often choose not to run because they believe that they could not defeat a white candidate in a runoff. According to Mr. Jackson, he has spoken to literally "thousands" of such potential black candidates over the course of his political career. On cross examination, however, Mr. Jackson was unable to recall the name of even one such individual who has been deterred from running in the last five years.

Plaintiff Tyrone Brooks, a state legislator from Atlanta, also testified at trial that the majority vote law

was generally a deterrent to black candidates. Like Jackson, however, Brooks did not give specific examples of individuals who had decided not to run because of the law. Former Atlanta Mayor Andrew Young testified by deposition that both Vernon Jordan and Julian Bond had been discouraged from running for United States Congress because they "felt like you couldn't get a majority of the vote in a runoff." Deposition of Andrew Young, at 39.

The court finds that this evidence minimally supports the notion that black candidates have taken the prospect of a runoff into consideration before entering the political arena. This does not prove, however, that the majority vote law improperly impacts potential black candidates. The evidence does not enable the court to determine the degree of pervasiveness of the alleged deterrent effect. Moreover, the evidence does not explain how the law is a more significant deterrent for black candidates than for white candidates who also must garner a majority of votes to win. The more likely source of proof for plaintiffs' case is the historical success of black candidates under the majority vote regime. The court now turns to that evidence.

2. Statistical Evidence of the Majority Vote Law's Racial Impact

The majority vote law has applied to approximately 41,000 elections since its passage in 1964. Under the supervision of defendants' expert, Dr. Michael Maggiotto, a data base was compiled which contains information about those elections that required runoffs to determine a

winner. Because information was either unavailable or unreliable for runoff elections occurring prior to 1970, the data base covers elections from 1970 to 1995. Of the 2,798 runoff sequences that occurred during that time period, complete data could not be found for 25. Thus, the data base contains information about a total of 2,773 elections.[11]

Much of the parties' analyses of the data focuses, quite naturally, on runoffs between a black candidate and a white candidate. The data base identifies 278 such races. Thus, the majority vote law could potentially have had a racial impact in just under 10% of all runoffs during the relevant time period. However, the law actually impacted far fewer elections. This is because the initial leader in these elections, regardless of race, usually won the runoff. So, for example, where a white candidate who was the highest vote getter in the initial election went on to win the runoff, the law had no effect on the race of the ultimate winner. The law has a racial impact only in "flip" sequences – i.e., where the leader in the initial election loses in the bi-racial runoff. The data base indicates that flips occurred in 85 races – less than one third of 1% of all elections, 3% of all runoffs, or 31% of all black-white runoff sequences.

Of the 85 flips, 56 were cases in which a black candidate won a plurality of votes in the initial election but lost the runoff. In the remaining 29 cases, a black candidate trailed in the initial election but won the runoff.

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[11] The vast majority (more than 90%) of these runoff elections were Democratic primary races.

Thus, the majority vote law worked to the disadvantage of black candidates in 66% of the flips and to their advantage in 34%. Under a pure plurality regime, therefore, Georgia would have gained an additional 27 black runoff-winners over the last quarter of a century (56 flips favoring whites minus 29 flips favoring blacks = 27 net black candidacies lost as a result of the majority vote law).[12] In the 1,197 runoffs occurring during the more recent period of 1983-1995, the state would have gained just 10 black winners.

The majority of flips adverse to black candidates have occurred on the county and local levels. In those races, a net loss[13] of 30 black candidates has resulted from the majority vote law's runoff requirement. By contrast, in state legislature and superior court elections, the runoff requirement resulted in a net *gain* of 3 victories for black candidates. The flips were evenly split in state-wide and federal contests; thus, there was no net gain or loss of black runoff winners.

A county by county analysis of the black-white runoff sequences is instructive. Over the 25 year period, 80%

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[12] Defendants correctly point out, however, that this does *not* necessarily mean that Georgia would have gained 27 black *office-holders* because a win in a primary election does not guarantee a win in the general election.

[13] A "net" gain or loss of black candidates indicates the difference between the number of flips adverse to black candidates and the number of flips in favor of black candidates. For example, if out of ten flips black candidates lost 6 times, the net loss of black candidates caused by the majority vote law's runoff requirement would be 2 – 6 adverse flips minus 4 positive flips = 2 net negative flips.

of Georgia's counties experienced either a net gain in black election winners or no net racial effect as a result of the majority vote law. All of the net losses at the county level occurred in only 32 of Georgia's 159 counties. Only two counties, Stephens and Greene, experienced as many as 3 net losses. Eight counties experienced a net loss of 2 black candidates, with the remaining 22 experiencing only a single net loss. Viewed on a jurisdictional level, the racial impact of the law is virtually imperceptible.

The defendants' political science expert posited that the disparity between black and white candidates in racial flips is largely, if not entirely, explained by an analysis of the relative strength of the black leaders who lost runoffs. A candidate who garners 40% or more of the votes in the initial election and who leads his or her closest opponent by at least 5% is considered a "strong leader" by political scientists. Irrespective of race, leaders who have won runoffs in Georgia overwhelmingly tend to be "strong leaders." They averaged about 40% of the vote in the initial election and they typically led their nearest opponent by 10 to 12 percentage points. Black "strong leaders" won runoffs against white opponents a convincing 71% of the time. Black leaders who lost runoffs, on the other hand, generally stood in a markedly weaker electoral position. Their vote total in the initial election averaged only 37.7% and their leader margin averaged approximately 6%, roughly half the margin enjoyed by leaders who won runoffs. Based on the data presented, the court concludes that black leaders who have lost runoffs have simply been weaker candidates on average than black or white leaders who have gone on to win runoff elections.

The net gains and losses discussed heretofore have been based on a comparison of the majority voting law's 50% threshold with a pure plurality system. But, as explained above, plaintiffs do not argue that the recently passed 45% threshold for most general elections has a racially discriminatory impact. In order to understand the true significance of majority vote law's racial impact, a "threshold analysis" is useful. Using this method, one can compare the effect of various thresholds on black-white contests.

For example, if the recently adopted 45% threshold had been utilized in runoffs over the last quarter century, black candidates would have fared *worse* than they did under the strict majority regime. At a 45% threshold, 8 races won by whites would have been won by blacks, while 9 races won by blacks would have been won by whites. Thus, the state would have experienced a net loss of 1 black election winner. Looking at the more recent elections only – i.e., those occurring between 1983 and 1995 – a 45% threshold would have resulted in a net loss of 3 black candidates. If the threshold had been lowered to 40%, the state would have netted 10 additional black victories between 1970 and 1995. All of those gains, however, would have occurred prior to 1983. Between 1983 and 1995, a 40% threshold would have yielded exactly the same number of black victories as actually occurred under the strict majority rule. Dropping all the way to a 30% threshold would have netted 21 new black victories over the 25 year period. Applied to the 1983 to 1995 period, a 30% threshold would have netted a mere 6 new black victories.

This threshold analysis reveals that mid-level thresholds – those in the 40 to 45% range – would have yielded no benefit to black candidates or would have actually hurt black candidacies over the past 12 years. Only if a drastically lower threshold had been used would the relatively small number of adverse flips be "recaptured." The fact that a very low threshold would be required to benefit black candidates is consistent with the court's conclusion above that black leaders who have lost runoffs have tended to be relatively weak candidates. It is this relative weakness, and not any alleged discriminatory impact of the majority vote law, that has resulted in the very slight differences between the experiences of black and white candidates in runoff flips.

Plaintiffs' expert, Dr. Stephen Cole, presented evidence suggesting that voting in Georgia is highly racially polarized. Based on ecological regression analysis and homogenous precinct analysis, he concluded that white voters favor white candidates and black voters favor black candidates more than 80% of the time. Plaintiffs posit the theory that such a degree of polarized voting, combined with the majority vote law, significantly impacts black candidates in majority white jurisdictions. Though the theory is logically sound, it is far less probative of the majority vote law's impact than the actual election data discussed above. Dr. Cole himself agreed that the runoff results reflected the law's impact more directly than polarized voting analysis. Even accepting, *arguendo*, Dr. Cole's conclusions about voting patterns among the Georgia electorate, the fact remains that the

majority vote rule had no negative impact on black candidates in more than 75% of the black-white runoffs occurring between 1970-1995, no negative impact in more than 98.5% of all runoffs during the period, and no negative impact in more than 99% of all elections during the period.

Dr. Cole's polarization analysis is also unconvincing insofar as it fails to account for the increase of Republican Party voters in Georgia over the last decade. Dr. Maggiotto testified that white voters in the state tend to vote Republican about 60% of the time and Democratic about 40% of the time. Black voters, by contrast, tend to remain almost universally Democratic in their voting patterns. Thus, in a jurisdiction where 60% of the electorate is white, black voters will comprise a majority of the voters in the Democratic primary (40% versus 24%). Although Dr. Cole used census data and/or voter registration data to determine whether various jurisdictions were majority white or majority black, he made no effort to determine the party affiliation of the white voters in a given jurisdiction. Therefore, the jurisdictions described as majority white by Dr. Cole could actually be majority black for purposes of Democratic primary elections, the locus of the vast majority of the black-white runoffs analyzed in his report. To the extent that Dr. Cole has attempted to show that black candidates are disadvantaged in runoffs where a majority of the electorate is white, his failure to account for party affiliation severely weakens his argument.

Defendants correctly note that there are several other methodological deficiencies in Dr. Cole's analysis which render his conclusion suspect. First, the data used by Dr.

Cole to determine the racial makeup of a jurisdiction were often five or more years distant (and in some cases 10 years distant) from the election he was analyzing. Second, Dr. Cole selected a relatively small number of elections for his regression analysis – 16 out of 55 sequences between 1992 and 1995 – and the court cannot determine whether this sample is representative. Third, Dr. Cole made no attempt to analyze the racial polarization of a given jurisdiction over time. At most, therefore, Dr. Cole's analysis proves polarization in a particular jurisdiction during a particular election in a particular year. *See Thornburgh v. Gingles*, 478 U.S. 30, 57 (1986). On the facts presented, plaintiffs have failed to prove racially polarized voting.

In sum, the court finds that plaintiffs have failed to present evidence of significant, adverse effects flowing to black voters and candidates from the majority vote law. Whether viewed in terms of absolute numbers (a net loss of 27 black candidacies out of 41,000 elections over 25 years) or in terms of percentages (no negative impact in 98.5% of all runoffs), the racial impact of the majority requirement is, at most, negligible.

III. CONCLUSIONS OF LAW

A. Voting Rights Act Claim

Congress amended § 2 of the Voting Rights Act in 1982 to supersede the Supreme Court's opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980), which "declared that, in order to establish a violation of either § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was

intentionally adopted or maintained by state officials for a discriminatory purpose." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). Section 2 now provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election on the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. Thus, a violation of § 2 may be proved by showing discriminatory effect alone. *Johnson v. DeSoto County Bd. of Comm'rs*, 72 F.3d 1556, 1560 n.3 (11th Cir. 1996).

The Amended act itself sets forth one circumstance relevant to the question of whether an electoral practice

has a discriminatory impact: "the extent to which members of a protected class have been elected to office in the State or political subdivision." 42 U.S.C. § 1973(b). The Senate Judiciary Committee Majority Report accompanying the bill that amended § 2 lists additional circumstances that might indicate a § 2 violation:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;

> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 97-417 97th Cong., 2nd Sess. 28 *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07; *see also Gingles*, 478 U.S. at 43 n.7 (the Senate Report is "the authoritative source for legislative intent" behind § 2). This list is intended to be neither comprehensive nor dispositive; rather, courts should consider these factors in determining whether, under the totality of the circumstances, the electoral practice in question has had a discriminatory result. *Gingles*, 478 U.S. at 45. There are, however, three limits upon the flexibility of the results test: (1) electoral devices, such as the majority vote requirement, are not *per se* violations of § 2; (2) "the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation;" and (3) "the results test does not assume the existence of racial bloc voting; plaintiffs must prove it." *Id.* at 46.

In *Gingles*, the Supreme Court identified three threshold prerequisites to a § 2 vote dilution claim. The Court

held that § 2 plaintiffs "must establish as a threshold matter: (1) that the minority group is 'sufficiently large and geographically compact to constitute a majority in a single-member district'; (2) that the minority group is 'politically cohesive'; and (3) that sufficient racial bloc voting exists such that the white majority usually defeats the minority's preferred candidate." *Nipper v. Smith*, 39 F.3d 1494, 1510 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1795 (1995) (citing *Gingles*, 478 U.S. at 50-51). Because the challenged practice in *Gingles* was a multi-member legislative districting scheme, the applicability of the three part threshold test, particularly the first prong, to the instant case is not immediately obvious. Recent explanation from the Eleventh Circuit, however, clarifies the court's task. The first prong of the *Gingles* test essentially "asks whether the court can fashion a remedy for a demonstrated abridgement." *Id.* at 1511. Put differently, it asks whether "the minority has the potential to enjoy more electoral success" under a workable alternative system. Note, Application of Section 2 of the Voting Rights Act to Runoff Primary Election Laws, 91 Colum. L. Rev. 1127, 1141 (1991). The second and third prongs, taken together, ask whether the "challenged electoral scheme is abridging the right of the plaintiff minority group 'to vote on account of race or color.' " *Nipper*, 39 F.3d at 1510-11. That is, whether white bloc voting means that the cohesive minority's preferred candidates "*usually*" lose. *Gingles*, 475 U.S. at 51. Gingles teaches that the ultimate question in a vote dilution action is whether, under the totality of the circumstances, the challenged practice "eviscerates the ability of minority voters to elect their

candidates of choice." Id. at 1512 (citing *Gingles*, 478 U.S. at 47).

1. The First *Gingles* Threshold Factor

The remedy sought by the plaintiffs in *Gingles* was the creation of single-member districts in which black voters would constitute a majority of the electorate. Thus, the Court had to determine if, in light of the minority group's size and geographic location, such districts could be drawn in the first instance. If the answer to that question were no, then the challenged "multi-member form of the district [could] not be responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50. The analogous question in the case at bar is whether black voting strength would be "less diluted" under some workable regime other than a strict majority vote requirement.

To answer this question, the court must identify "a reasonable benchmark by which to evaluate" the majority vote law. *See Holder v. Hall*, ___ U.S. ___, 114 S. Ct. 2581, 2586 (1994); *Nipper*, 39 F.3d 1494, 1511 n.34. One possible benchmark is a plurality system, as plurality is defined in Georgia – "the receiving by one candidate alone of the highest number of votes cast . . . provided that such number of votes exceeds 45 percent of the total number of votes case." O.C.G.A. § 21-2-2(18.1). This 45% threshold is now applicable to the vast majority of general elections in Georgia, *see* O.C.G.A. § 21-2-501, and is not challenged as discriminatory by plaintiffs. As explained above, using a 45% rule would not merely fail to remedy an alleged dilution of black voting strength – it would actually result

in fewer black victories. Applied to runoffs between 1970 and 1995, a 45% rule would have resulted in a net *loss* of one black election winner. Applied to the more recent period of 1983 to 1985, a net loss of three black candidates would have occurred. A 45% "remedy," therefore, would be no remedy at all, and plaintiffs would fail the first *Gingles* threshold prerequisite for relief.

Another possible benchmark is a pure plurality system. As explained above, such a system would have resulted in a net gain, as compared to the majority vote regime, of 27 black runoff winners over the last quarter century. At first blush, this suggests that a pure plurality system could marginally increase the potential for black voters to elect black candidates. Upon closer scrutiny, however, it becomes apparent that a plurality rule would not necessarily lead to more black elected officials. Because primary winners must compete in general elections in order to gain office, pure plurality primary winners will in the vast majority of cases be required by O.C.G.A. § 21-2-501 to garner 45% of the votes in the general election. Rather than demonstrating to the court that black primary winners would be capable of winning general elections, plaintiffs have made every effort to convince the court that voting in Georgia is so polarized that racial minorities cannot win in majority white districts. Accepting their arguments as true, a plurality primary system would not increase "the potential [of blacks] to elect representatives in the absence of the challenged structure," *Gingles*, at 50, n.17; *see also* Note, *supra*, 91 Colum. L. Rev. at 1154 (§ 2 plaintiffs must prove that minority candidates who win plurality of votes in the primary are capable of actually being elected to office).

Rather, a pure plurality system would result in no net increase of black elected officials. Plaintiffs thus fail to establish the first *Gingles* threshold factor.

2. The Second and Third *Gingles* Factors

The second and third *Gingles* threshold factors are "essentially a gloss on the Senate factors" listed above. *Nipper*, 39 F.3d at 1512. Plaintiffs have demonstrated that Georgia has a notoriously fertile history of official discrimination against black voters (Senate factor 1) and that this discrimination has taken the form of literacy tests and other invidious voting practices and procedures (Senate factor 3). Beyond this, plaintiffs have focused primarily on racially polarized voting (Senate factor 2) and the relative success *vel non* of blacks in (primary) elections (Senate factor 7).

It is possible that racially polarized voting is the norm in Georgia. As explained in the Court's factual findings, however, the evidence presented does not prove that this is the case. The Supreme Court has been unmistakably clear in asserting that § 2 "does not assume the existence of racial bloc voting; plaintiffs must prove it." *Gingles*, 478 U.S. at 46. Plaintiffs fail to carry that burden here.

However, even if plaintiffs' proof were sufficient to establish racially polarized voting, their evidence regarding the actual success of black candidates under the majority vote law does not support their claim. The law had no negative racial impact on black candidates in more than 75% of the black-white runoffs occurring

between 1970 and 1995 and no negative racial impact in more than 98.5% of all runoffs during the period. In light of these facts, the court cannot conclude that white bloc voting, assuming it exists, causes the minority's preferred candidates *"usually"* to lose under the majority vote regime.

Under the totality of the evidence presented by the parties, the court concludes that O.C.G.A. § 21-2-501 does not "eviscerate[] the ability of minority voters to elect their candidates of choice." *Nipper*, 39 F.3d at 1512.[14] Therefore, plaintiffs have failed to establish a violation of § 2 of the Voting Rights Act.

B. Constitutional Claims[15]

In order to make out a constitutional claim based upon Georgia's majority vote requirement, which is neutral on its face, plaintiffs must show both that the 1964

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[14] As discussed *infra*, plaintiffs have failed to establish a discriminatory purpose for the adoption of the law. To the extent that plaintiffs attempt to base their § 2 claim on alleged discriminatory intent, their attempt fails.

[15] The elements of plaintiffs' constitutional claims are the same whether characterized as arising under the Fourteenth or Fifteenth Amendments. *See Mobile, supra*, 446 U.S. 55; *Thornburg, supra*, 478 U.S. at 36; *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1979). Plaintiffs cite no authority indicating that labeling their claim as arising under the First Amendment changes the analysis; thus, the court will apply the *Mobile* standard to all of plaintiffs' constitutional claims. *See Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981) (holding that First Amendment protection of voting rights – if it exists at all – is no greater than that provided by the 14th and 15th Amendments).

law was enacted with a racially discriminatory intent and that it has had a racially disproportionate impact. *Mobile v. Bolden, supra,* 446 U.S. 55; *Johnson,* 72 F.3d at 1560 n.3. Plaintiffs' failure to prove a disproportionate impact, discussed above, entitles defendants to judgment on plaintiffs' constitutional claims, as well. Even if plaintiffs had shown a discriminatory result, however, the court concludes that they have failed to make the requisite showing of discriminatory intent.

To establish the necessary intent, plaintiffs must show that "the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial discrimination.' " *Mobile,* 446 U.S. at 66 (quoting *Whitcomb v. Chavis,* 403 U.S. 124, 149 (1971)); *see also Washington v. Davis,* 426 U.S 229 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977). The legislature is presumed to act constitutionally. *Butts v. City of New York,* 779 F.2d 141, 147 (2d Cir. 1985) (citing, *inter alia, Borden's Farm Prods. Co. v. Baldwin,* 293 U.S. 194, 209 (1934)). However, discriminatory purpose may be inferred from the totality of the relevant facts, including both direct and circumstantial evidence. *Washington,* 426 U.S. at 242; *Arlington Heights,* 429 U.S. at 266. Relevant considerations include the historical background of the challenged act, the "specific sequence of events" leading up to the acts passage, and the legislative history of the act, "especially where there are contemporary statements by members of the decision making body, minutes of its meeting, or reports." *Arlington Heights,* 429 U.S. at 266-68. As the Supreme Court observed in *Hunter, supra,*

> [p]roving the motivation behind official action is often a problematic undertaking. . . . With

> respect to Congress, . . . [i]nquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressman said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

471 U.S. at 228. In this case, plaintiffs offer both direct and circumstantial evidence of discriminatory intent. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (quoting *Mt. Healthy City Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977)).

Georgia has long been fertile ground for challenges to voting and election practices, and deservedly so. Plaintiffs have ably demonstrated that Georgia's efforts at election law reform from 1957 to 1964 grew in large part from a desire to maintain a segregated and discriminatory status quo in the face of rising black voter registration and heightened scrutiny by the federal government. Many of the facially neutral proposals that the ELSCs

debated smack of racism, such as criminalizing voter assistance and excluding those convicted of certain crimes. Indeed, the majority vote requirement itself was championed by some with ignoble motives, most prominently Denmark Groover, who viewed it as an antidote to black bloc voting. Plaintiffs' best evidence that the challenged law was enacted with a discriminatory purpose is the evidence that Sanders, the most prominent proponent of the measure, was racially motivated in his support of at-large election of Georgia senators. Sanders was quoted as saying he thought county-wide voting would prevent the election of a black senator from Fulton County. However, the fact that the virus of race-consciousness was in the air does not lead ineluctably to the conclusion that the specific measure at issue here – the majority vote requirement in the 1964 election code – was infected thusly.

Assuming that plaintiffs have proven that the challenged law was enacted for race-conscious reasons, defendants have shown that it would have been enacted even in the absence of those reasons. It is clear that Sanders and other supporters of the majority vote requirement had ample "good government" reasons for advocating the measure. They wanted to standardize elections in Georgia and to eliminate the chicanery that characterized plurality voting under the reign of the courthouse crowds. Indeed, Sanders himself narrowly avoided being the victim of such chicanery in the 1962 race for lieutenant governor. It is also clear, despite plaintiffs' attempts to tie Groover to the passage of the 1964 law, that Sanders and his allies were chiefly responsible for the new election code and that Groover had no input. Finally, even though Sanders' support of at-large senate

elections in 1962 was racially tinged, he also had good government reasons for his position on that issue. In short, the court finds the 1964 law's majority vote requirement would have been enacted for good government reasons, had race played no role in the matter whatsoever. Thus, plaintiffs have failed to prove that the measure was enacted with an overriding discriminatory purpose, and their constitutional claims must fail.

IV. CONCLUSION

Accordingly, after careful consideration of all the evidence, the court finds that defendants are entitled to judgment on plaintiffs' claims. The Clerk is DIRECTED to ENTER judgment in favor of defendants and to CLOSE this file.

SO ORDERED, this 25 day of September, 1996.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
SENIOR UNITED STATES
DISTRICT JUDGE

42 U.S.C. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in population.

Supreme Court, U.S.
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No. 98-1521

In The

Supreme Court of the United States

October Term, 1998

TYRONE BROOKS, et al.,

Petitioners,

vs.

ROY BARNES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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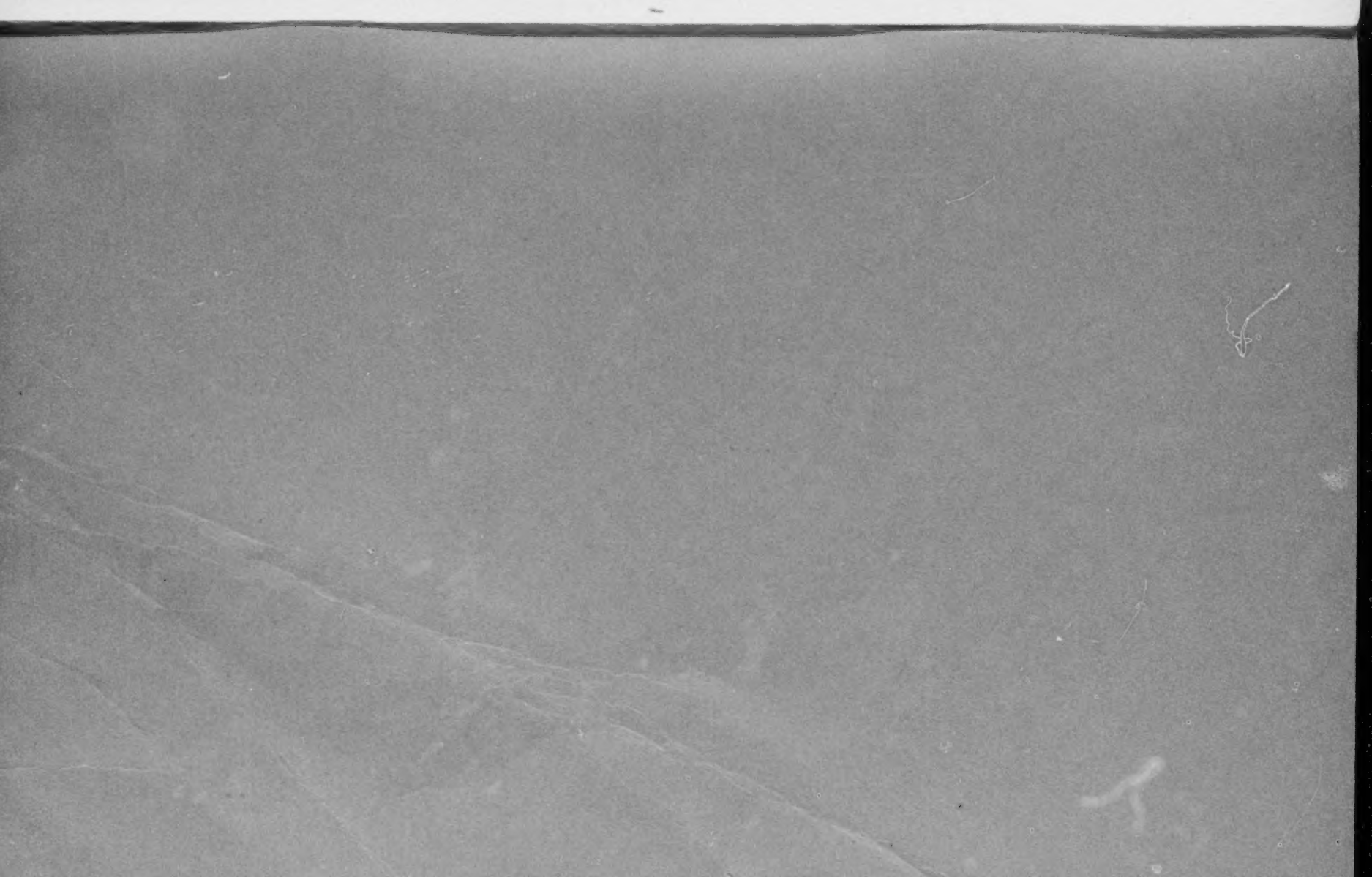

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STATEMENT OF MATERIAL FACTS

A. *The Enactment Of The 1964 Code.* The election code at issue here came about as a result of the efforts of Gov. Carl Sanders. Election law reform was a centerpiece of his gubernatorial campaign, and was one of two issues that led him to call the General Assembly into special session in 1964. Sanders appointed an Election Law Study Committee – which was separate and distinct from the ones appointed by prior governors – to draft a code and propose it to the General Assembly. One of the members of that Committee, Melba Williams, testified that majority voting was included in the proposed code without regard to any racial purpose. There was no testimony that her reasons might have been racial. (Pet. App. 41 n.6)

The purpose behind a legislative enactment necessarily focuses on the motives of *those persons who caused the enactment at issue to become law.* Here, the evidence is that the election code – and the majority vote provision specifically – were the product of the Sanders administration. There is abundant evidence that the majority vote law was passed by these key actors for beneficial, non-racial reasons. As Gov. Sanders testified, he supported majority voting in 1964 because

> I had seen too many instances where people went into office with a few votes on a plurality that I didn't really feel that that was the choice of the people. That just happened to be the results that came out because they had so many people they had gotten into a race and had sort of divided up the election results.

. . . .

> I think the public was ill-served by not having a candidate with a majority of the people – unless they had a candidate with the majority of the people supporting them. I think, otherwise, it was a disservice to the voter. That was my opinion. (P.I.T. Vol. V, 183-84)[1]

Like most people of the era, Gov. Sanders assumed that "majority rule" was a basic principle of American politics. He had seen people elected in Georgia under the old system with as little as 30% of the vote. That experience left him thoroughly disenchanted with plurality voting. (Id. 181) Gov. Sanders testified about other reasons for supporting majority voting which had nothing to do with race. He never heard anyone suggest "that plurality voting would be better for black candidates." (Id. 188) On cross-examination, plaintiffs' counsel declined to challenge Gov. Sanders on a single one of the reasons he gave for favoring majority voting. (Id. 199-231)

Testimony explaining similar non-racial reasons for supporting majority voting was given by other surviving witnesses who were involved in passing the election code and the majority vote provision. These witnesses included Milton Carlton, who was the President Pro Tem of the Senate in 1964, and the Speaker of the House from 1964, George T. Smith. (Id. 76-78, 80-83)

B. ***Plaintiffs' Evidence On The Issue Of Intent.*** The plaintiffs' intent case was based on the testimony of two

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[1] The separate transcript of the one-week preliminary injunction hearing held in 1990 will be cited as "P.I.T. Vol. ___."

history professors, Morgan Kousser and Steven Lawson. They, in turn, relied on their interpretations of various newspaper articles. The testimony of both professors revealed a singular lack of objectivity. Evidence that was inconsistent with the plaintiffs' thesis was uniformly ignored. Professor Lawson, for example, purported to rely on an unrecorded interview with ex-State Senator Leroy Johnson to support Lawson's opinion. But Lawson admittedly ignored sworn testimony by Johnson which contravened his opinion. (R. 14-154 to 155, 158-61, 177-78) Similarly, Lawson admittedly ignored the testimony of ex-House member James Mackay to the extent that it contradicted his opinion. (Id. 166-69) To the extent that Mackay's testimony could be used to substantiate Lawson's opinion, however, it was accepted without reservation. Id. Lawson also ignored volumes of sworn testimony by participants in the 1964 events that did not support the conclusion he wanted to come to. (Id. 150-51, 154-55, 158-59, 160-64, 172-73, 201-07)

The ultimate opinion offered by Professor Lawson still fell short of what is necessary for the plaintiffs to prevail. He had no opinion as to whether the majority vote law would have been adopted independent of race. (R. 14-240)

Petitioners contend that Gov. Sanders' support of majority voting was motivated by racial enmity. But plaintiffs' own non-expert witnesses – i.e., those persons who were actually involved in Georgia politics at the time, who personally knew Sanders, and who were then in the General Assembly – disagreed with that characterization. One of these two witnesses, James Mackay, testified that Sanders was the "most racially progressive

political figure in the South of any prominence back in those days." (Def. Ex. 880[2], Tab. 16 p. 541) The other witness, ex-Senator Leroy Johnson (a black member of the Georgia Senate), also admitted that Sanders' support of majority voting was not motivated by race. (Id. Tab. 14, p. 647) He testified to the same effect regarding Speaker George T. Smith. (Id. 641)

Plaintiffs also described the 1964 election code as "regressive" with regard to blacks' voting rights. The opposite was true. While the code did not eradicate all vestiges of Georgia's segregationist past, it was in no way a move backwards. Indeed, it is remarkable that petitioners attempt to paint such a bleak picture of the overall election code in light of the testimony of their own witness, Rep. Mackay. He testified that "the election code that was enacted in 1964 was a tremendously positive progressive reform for Georgia election laws." (Id. Tab 16, p. 548)

Plaintiffs relied largely on the supposed impact of one legislator, Denmark Groover. Their reliance was misplaced. While Groover got a majority vote bill passed in the House two sessions earlier (in the 1963 general session), that bill never became law. The majority vote provision that was actually enacted and that is at issue here, had completely distinct origins.

---

[2] Defendants' Exhibit 880 are excerpts of testimony from witnesses in the trial of *Georgia v. Reno*, 881 F.Supp. 7 (D.D.C. 1995), where the Department of Justice unsuccessfully challenged Georgia's majority vote law.

Appellants ignore the uncontradicted testimony of the witnesses who actually participated in the enactment of this legislation, including Gov. Sanders himself. There is no evidence that Groover had any influence or impact in causing the Sanders administration to support the majority vote provision in the election code. As Gov. Sanders testified regarding Groover:

> A: He never discussed it [majority voting] with me, and he was not a part of my leadership. In fact, he was in the opposite camp and probably, you know, had no input into my administration. So I really don't recall Denmark Groover or anything that he might have said or done. I wasn't that interested in what Mr. Groover might have been saying or doing in that particular time.

> The Court: Even though he was not one of your chosen members, did he have political clout? People on the opposite side frequently do, and you have to do business with those people, don't you?

> A: Well, you do now a lot more than you did then. . . . But he had been Marvin Griffin's floor leader when I was elected to the House, and I was on the outside then, you know; I was not part of that administration. He very vigorously supported former Governor Griffin when I ran for governor.
>
> So, when I got elected and he was re-elected to the House, he had no influence, so far as I was concerned. And, fortunately, I had enough influence with the vast majority of the General Assembly to where, other than him being sort of a gadfly and picking at

> things and trying to spoil things, he was not influential at all. (P.I.T. Vol. IV, 188-89)

The Speaker of the House, George T. Smith, knew as well as anyone what influence Rep. Groover had during the Sanders administration. Smith testified as follows:

> Q. Now, while you were Speaker of the House and in 1963 and 1964, specifically, what was Denmark Groover's role and power in the House?
>
> A. He didn't have any power at all. He was, as you recall, Governor Marvin Griffin's floor leader for a couple of years, and he supported Governor Griffin very strongly. He had absolutely no influence. He was not a party to the Sanders team. He was not consulted. He was not invited into nor did he sit in any of the planning sessions. (P.I.T. Vol. V, 74)

The district court found, as it only could based on the evidence, that Groover's "ignoble" motives had nothing to do with the enactment of the provision at issue here:

> [Plaintiffs] claim that Denmark Groover's racial antipathy . . . must be imputed to the supporters of the 1964 law's majority vote requirement. However, Groover played no role in the Sanders administration, was not a member of the third ELSC, and had little or no influence upon the committee. Indeed, Groover was in the opposite camp by virtue of his support of Sanders' opponent in the gubernatorial race, Marvin Griffin. The court, therefore, will not attribute Groover's motives to the supporters of

> the 1964 law's majority requirement. (Pet. App. 42)
>
> . . . .
>
> It is clear, despite plaintiffs' attempts to tie Groover to the passage of the 1964 law, that Sanders and his allies were chiefly responsible for the new election code and that Groover had no input. (Id. 64)

The two ex-legislators who testified on behalf of the plaintiffs were of no assistance to them in this regard. While highly critical of Groover, Sen. Johnson was unaware of the legislative course of the 1964 Sanders election code reform bill. (Def. Ex. 880, Tab 14, p. 650) Even more significantly, Rep. Mackay *admitted that the election code that ultimately passed was not Groover's.* As Mackay testified, "I am willing to give one hundred percent to Governor Carl Sanders and his election law committee because they did a very thorough job." (Id. Tab 16, p. 557) He acknowledged Groover was not involved in that effort:

> [I]f you are trying to ex[o]rcise the memory of my colleague Denny Groover, I am willing for you to do it because I am willing to say that his hand was not in that election law commission's report. Id.

C. ***The Impact Of The Majority Vote Law.*** Comprehensive evidence was introduced regarding all runoff elections for primary, special and general elections in Georgia from 1970 to 1995. There were 2,773 such elections. Only some 10% of all of these runoff elections involved both a black and a white candidate. An even smaller percentage involved runoff elections in which the

race of the ultimate winner changed, as a result of a runoff, because the initial leader lost the runoff. Because any racial implications of the majority vote law are limited to the small fraction of those elections whose outcomes changed in a run-off, it can fairly be said – from this fact alone – that the racial impact of the law is slight. (Pet. App. 46-47)

Plaintiffs ignored this fact. They looked instead at only a handful of elections. But to concentrate on only a few of Georgia's nearly 3,000 runoff elections, does not fairly or objectively describe the overall impact of the law at issue here. Moreover, if one does focus just on the subset of runoff elections that involved cross-race elections, the racial implications of the runoff law are still insignificant. To assess the impact of the majority vote law in bi-racial runoffs, one must look at the *net* impact. That is determined by (1) taking the number of instances where initial black leaders subsequently lost a runoff to white candidates and (2) subtracting from that figure the opposite cases, i.e., those elections where a black candidate overcame, in a runoff, the white leader from the initial election. The difference between those two figures yields the ***net*** numerical difference in the number of candidates of either race who ultimately won.

For the years 1983-95, throughout the State, there was a total impact on black candidacies of "minus 14" for county-level offices. In other words, had the majority vote runoff not applied and a pure plurality rule been in place instead, there would have been a net of 14 more successful black nominations, out of the total of 1,045 runoffs that occurred for those offices (approximately 1.34%). (Def. Ex. 877 Table 3, p. 38; Def. Ex. 870) At the

same time, the majority vote runoff requirement had a net *positive* impact on black candidacies of "plus four" for legislative and superior court offices. Id. The racial impact for statewide and federal offices was a wash, with one black "positive flip" and one black "adverse flip" out of 41 runoffs from 1983 to 1995. Id.

In sum, there would have been a net increase of ten more black candidates nominated had the majority vote law been replaced by a pure plurality practice from 1983-95 for all county, state and federal offices throughout the entire State of Georgia. (Pet. App. 48) By any reckoning, that is an extremely small number compared to the number of offices actually elected, and the total of some 20,000 primary, special, and general elections during that time. It is also an extremely small number in comparison to the total number of runoffs, 1,197, during that same period.

The data reveals other conclusions. Among political scientists, the term "strong leader" refers to a candidate who soundly wins an election. A "strong leader" is one who garners at least 40% of the total vote and leads the next highest finisher by at least 5%. (Pet. App. 49) The data in Georgia shows that these "40 plus 5" strong leaders are particularly likely to win runoff elections. For the entire quarter of a century period, strong black leaders for county and local offices won 71% of their runoffs against white opponents. Id.

While the overall data does reveal some slight disparity in black and white leaders winning in cross-race runoffs, that difference is completely explained by the fact that more black leaders in the initial race were not

"strong leaders" compared to white leaders. Id. Regardless of race, leaders who won shared strong performance records in the initial election. They averaged over 40% in the initial election and they typically beat their nearest rival by ten to twelve percent. Id.

Black leaders who lost runoffs in Georgia were distinctly different. They had significantly lower vote percentages in the first primary, averaging 37.7%, and their margin over the second place finishers in the first election was only about half of that enjoyed by first election leaders who won runoffs. In other words, black leaders who lost were simply weaker candidates, on average, than black or white leaders who won runoffs. Id.

Defendants also did a jurisdiction by jurisdiction analysis of the runoff data. It showed that there were net losses for black candidates in only about 20% of Georgia's counties (32 out of 159) over the quarter of a century 1970-95. In 80% of Georgia's 159 counties, there were no net losses of nominations (much less elections) or there were actually *net gains* by black candidates seeking these county offices. Only 2 of 159 counties experienced as many as 3 net losses; 8 counties had 2 net losses; and 22 experienced a single loss. (Pet. App. 49) The more recent data shows even less of an impact. From 1980 to 1995, the vast majority of counties show either (1) no negative "net impact" or (2) a positive "net impact" on black candidacies as a result of the majority vote requirement. (Def. Ex. 852).

ARGUMENT

I. THE LOWER COURTS PROPERLY CONCLUDED THAT GEORGIA'S MAJORITY VOTE RULE DOES NOT RESULT IN DISCRIMINATION IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT.

A. The Impact Of Georgia's Majority Vote Law Cannot Be Characterized As Having A Meaningful Racial Impact.

1. Plaintiffs' Evidence Does Not Satisfy The Basic Preconditions To Prevail In A Section 2 Case.

The high water mark for challenging electoral practices under Section 2 occurred in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Justice Brennan's plurality opinion set forth several prerequisites to proving a Section 2 claim, one being that the challenged statute caused candidates supported by minority voters to be "usually defeated." Plaintiffs' proof failed this test. First, they focused almost exclusively on *nominations*, but nomination is not election. To be elected to the offices that plaintiffs challenge (with the exception of Georgia's nonpartisan judgeships), one must prevail in a partisan general election. There, one must normally win a majority of the votes by virtue of the two party system, or at the very least, win a 45% vote[3] to prevail under the *unchallenged* general election statute.

---

[3] Petitioners assert that Georgia's 1994 reduction of the 50% majority to a 45% requirement for most general elections was done just to improve the political chances of Democrats. (Pet. pp. 2-3) In fact, the evidence is that that law arose because Libertarian candidates have often run for statewide offices in Georgia and garnered 2 or 3% of the vote, sometimes prompting statewide runoffs for one or two offices. The General Assembly enacted a 45% requirement for those general elections because of that problem.

Secondly, runoffs caused by Georgia's majority vote law occur in only a fraction of all elections in the State. Thus, even if there were a significant racial impact caused by the majority vote law itself, the statute would still not be causing the "usual defeat" of black candidates. In most elections, winners achieve 50% in the initial election. *Most blacks holding office throughout the State, as well as most whites, have won their positions by winning over 50% of the vote in the initial election.* Because of these facts alone, plaintiffs cannot cross the *Gingles* "usually defeated" threshold.

Finally, even if black candidates were faring poorly in runoffs, that would still be only one piece of the evidence that plaintiffs would have to prove. As Section 2 was explained in *Gingles*, plaintiffs would also have the burden of showing that specific races in the specific jurisdictions were lost because of racially polarized voting. Other factors would also have to be taken into account for the plaintiffs to prove that race was the actual *cause* of the defeat of the minority voters' choices. See, e.g., *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), cert. denied, 514 U.S. 1083 (1995). Plaintiffs did not come close to meeting this burden.

2. As A Matter Of Fact, The Actual Impact Of Majority Voting In Georgia Is Not Discriminatory.

Assuming plaintiffs can state a Section 2 claim, the evidence fell far short of showing that Georgia's law "results" in discrimination. The evidence revealed the following:

1. In the overall context of all Georgia elections, the racial impact of majority voting is nil.

2. In the small percentage of elections that resulted in bi-racial runoffs, the runoff had no effect in the great majority of cases.

3. While there are a handful more instances where black frontrunners have lost a runoff to white opponents than there are the opposite, that difference is close to nil.

4. In the context of all runoff elections, the racial impact can best be described as a wash.

5. What little net difference there has been between blacks losing bi-racial runoffs (after initially coming in first with a plurality) and the opposite, the effect is even less nowadays than it was in the past.

The evidence provided an ample basis for the district court's findings:

> [T]he court finds that plaintiffs have failed to present evidence of significant, adverse effects flowing to black voters and candidates from the majority vote law. Whether viewed in terms of absolute numbers (a net loss of 27 black candidates out of 41,000 elections over 25 years) or in terms of percentages (no negative impact in 98.5% of all runoffs), the racial impact of the majority vote requirement is, at most, negligible. (Pet. App. 53)

3. Plaintiffs' "Discouragement" Contention Is Without Merit Both Factually And Legally.

Petitioners contend that the majority vote requirement has "deterred" black candidates from seeking office. (Pet. 11-12, 20) The sole evidence plaintiffs offered to prove this allegation was vague testimony by several witnesses to the effect that some persons may have been "deterred" from running on account of the majority vote law. The trial court found the evidence unconvincing. For example, ex-Atlanta Mayor Maynard Jackson waxed on, as the court found, about how he had

> spoken to literally "thousands" of such potential black candidates over the course of his political career. On cross-examination, however, Mr. Jackson was unable to recall the name of even one such individual who has been deterred from running in the last five years. (Pet. App. 45)

At best, as the district court noted, the evidence adduced by plaintiffs

> minimally supports the notion that black candidates have taken the prospect of a runoff into consideration before entering the political arena. This is not proof, however, that the majority vote law improperly impacts potential black candidates. . . . Moreover, the evidence does not explain how the law is a more significant deterrent for black candidates than for white candidates who also must garner a majority of votes to win. (Id. 46)

B. The Absence Of Any Legally Cognizable Benchmark Forecloses A Section 2 Challenge.

Respondents contend that Section 2 does not allow a challenge to majority voting because there is no appropriate "benchmark" by which majority voting should be assessed. *Holder v. Hall*, 512 U.S. 874 (1994), rejected a voting challenge to the one-person county commission in Bleckley County, Georgia. A majority of the Court agreed that a Section 2 challenge could not be asserted because of the wide range of possible alternative benchmarks (i.e., possible sizes for the governing county commission). The same problem exists here. What are the "results" of Georgia's majority vote law to be judged against? While plaintiffs assume that a pure plurality system is the benchmark alternative, that is merely one of many possibilities. Another possibility would be 45%, as reflected in Georgia's current policy choice for general elections. There could also be a threshold minimum of 40%, 39%, 35%, or anything else. The pure plurality practice plaintiffs favor would mean that a candidate could prevail with one percent of the votes, so long as he or she was the top vote getter. By no means is that the obvious benchmark for a Section 2 assessment of Georgia's majority vote law.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT GEORGIA'S MAJORITY VOTE LAW WAS CONSTITUTIONAL.

A. The Legal Elements Required To Prove Purposeful Discrimination.

To make out a prima facie case of purposeful discrimination, plaintiffs must prove that the statute was enacted

"because of" a discriminatory purpose and that it would not have been enacted "but for" such a purpose.

> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case the State legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

Even where plaintiffs prove that discrimination had been a "substantial motivating factor" in the adoption of a statute, there still is not illegal discrimination if the State would have adopted the statute regardless. *See Mount Healthy School District v. Doyle*, 429 U.S. 274 (1977). In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court held that the *Mount Healthy* analysis applies in determining whether voting statutes are unconstitutional because of a discriminatory purpose.

B. The District Court Properly Concluded That Georgia's Majority Vote Law Was Not Adopted For The Purpose Of Discriminating.

The district court gave a painstaking evaluation of the historical evidence. While plaintiffs may not like the results, by no stretch of the imagination are the court's findings clearly erroneous. More than ample evidence supports both the specific findings of the court and its ultimate conclusions. Some of the court's findings are as follows:

> Prior to the passage of the 1964 law, the state of elections and election laws in Georgia was chaotic. Georgia's election laws were marked by corruption and manipulation, and there were few laws to check such practices. Throughout the state, and in rural counties in particular, local elections were controlled by groups referred to as "courthouse crowds" which consisted of various office holders and politicos at the county courthouses. . . . [Election] rules – including the majority/plurality vote rules – varied from county to county and from election to election.
>
> The courthouse crowds sometimes manipulated elections by using plurality voting to retain their power. For example, spurious candidates called "stalking horses" were entered into local races to split the opposition vote and assure victory to candidates from the courthouse crowds – even though those candidates may have been opposed by a majority of the voters. (Pet. App. 35-36)

The court then went on to discuss the election law study committees which petitioners would put much stock in. Contrary to their contention that the district court ignored all of their evidence, these matters were discussed in detail. In addition, the evidence made it clear that the ELSC formed under Gov. Sanders was a complete break from the past. Petitioners' reliance on racial evidence from the earlier ELSCs in the 1950s (when far different governors were appointing the members of the committees) is simply an effort to cite inflammatory evidence that does not address *why the 1964 law was passed.*

In truth, the appellants' heavy reliance on the records of the ELSCs should be fatal to their claim. As is apparent from the archived records of these committees, no effort was ever made to "purge" the records of any of the State's racial past. A number of documents from the records of the prior ELSCs reveal explicit concerns based on race. If anyone wanted to determine what recommendations of those committees were racially motivated, it would be easy to do so.

Similarly, the records of the Sanders-appointed ELSC contain racially explicit documents. Racially explicit citizen input, for example, is there for all to read as to several issues. The totality of this evidence, however, speaks volumes by virtue of the absence of anything indicating that race played a role in the inclusion of the majority vote provision in the 1964 code. Every single document in the complete, unexpurgated records of the 1963-64 election law study committee are contained in defendants' exhibits 125-243. (R. 9-152-1 [fact stips.]) Not one of these hundreds of pages links race to majority voting.

In light of the picture petitioners try to paint, the absence of a single shred of such evidence in these records is a powerful contradiction of their whole theory. Given that there is a clear historical trail of racial purpose concerning some issues, the *absence* of any suggestion of a racial purpose in the 1964 ELSC's majority vote proposal strongly suggests that there was no such purpose.

Judge Freeman thoroughly discussed the evidence in this case, and he made the following findings on the

purpose issue. They abundantly support his conclusions of law:

> Many of the key backers of the 1964 law's majority vote requirement had "good government" motivations. They wanted to eliminate the use of stalking horse and dummy candidates and to loosen the courthouse crowds' grip on political power. One of those backers was Governor Sanders, who focused on election law reform in his 1962 gubernatorial campaign, appointed the third ELSC, and avidly supported majority voting. . . . [House Speaker] Smith also supported a majority vote rule, both for good-government and for personal reasons. Smith wanted to run for lieutenant governor in 1966 against incumbent Peter Zack Geer but feared he could not beat Geer under the plurality system.
>
> Plaintiffs make several arguments in support of their thesis that the 1964 law's majority vote requirement was racially motivated. First, they claim that Denmark Groover's racial antipathy, the basis for his 1963 majority vote bill, must be imputed to the supporters of the 1964 law's majority vote requirement. However, Groover played no role in the Sanders administration, was not a member of the third ELSC, and had little or no influence upon the committee. Indeed, Groover was in the opposite camp by virtue of his support of Sanders' opponent in the gubernatorial race, Marvin Griffin. The court, therefore, will not attribute Groover's racist motives to the supporters of the 1964 law's majority requirement. (Pet. App. 41-42)

. . . .

> Assuming that plaintiffs have proven that the challenged law was enacted for race-conscious reasons, defendants have shown that it would have been enacted even in the absence of those reasons. It is clear that Sanders and other supporters of the majority vote requirement had ample "good government" reasons for advocating the measure. They wanted to standardize elections in Georgia and to eliminate the chicanery that characterized plurality voting under the reign of the courthouse crowds. Indeed, Sanders himself narrowly avoided being the victim of such chicanery in the 1962 race for lieutenant governor. It is also clear, despite plaintiffs' attempts to tie Groover to the passage of the 1964 law, that Sanders and his allies were chiefly responsible for the new election code and that Groover had no input. . . . In short, the court finds the 1964 law's majority vote requirement would have been enacted for good government reasons, had race played no role in the matter whatsoever. Thus, plaintiffs have failed to prove that the measure was enacted with an overriding discriminatory purpose, and their constitutional claims must fail. (Id. 64-65)

Petitioners' contention that the lower courts "misapplied" *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), is misplaced. They wrongly assume that *Arlington Heights* set down some kind of procrustean rules that the district court ran afoul of. In fact, *Arlington Heights* simply gave some suggestions about the kinds of evidence that might be used in determining purpose in Fourteenth Amendment cases. But the ultimate finding of a court is governed by the

same rules of evidence and the same practical reasoning that control in any case, whether the issue of intent be in a constitutional case, a securities fraud case, a criminal case, or any of the hundreds of other contexts in which purpose and motive are at issue. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights, supra* at 266. That is exactly what the district court here did.

CONCLUSION

For the foregoing reasons and the reasons set forth in the lower courts' opinions, respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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